No. 82-510

[redacted] DEVELOPMENT COMPANY,
Petitioner,

THE [redacted] ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[redacted]
THOMAS C. WALKER
[redacted]
1800 M Street, N.W.
Washington, D.C. 20036

R. PAUL THEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135
Counsel for Petitioner

OF COUNSEL:
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

CROWE & THEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

[redacted]

INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ:

1. The Decision Below Erroneously Converts the NEPA Standard of Major Federal Action into *Any* Federal Action and Thus Highlights the Immediate Need for Guidance by the Court on What Federal Activities Do *Not* Constitute "Major Federal Action Significantly Affecting... The Environment" Requiring an Environmental Impact Statement 6

2. By Frustrating the Statutory Scheme of the Interstate Land Sales Full Disclosure Act, the Decision Below Conflicts with the Principle Announced by the Court in SCRAP I that NEPA Does Not Sub Silentio Amend or Repeal by Implication any other Statute 13

3. The Significance of the Issues Before the Court and the Magnitude of the Error Below is Underscored by the Wide Impact of the Decision Below 17

Conclusion 20

Appendix:

A. Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit 1a

Page

B. Opinion and Judgment of the United States District Court for the Eastern District of Oklahoma 1b

C. The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1706(a), (b), (d) and 1716; The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4332 (2)(C)-4335 ..... 1c

TABLE OF CITATIONS

Cases:

Arrow Transportation Co. v. Southern Ry. Co., 372 U.S. 658 (1963) 13

City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972) 11

Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) 9

Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) 12

Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972) 9

Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.C.D.C. 1971) 9

Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) 10

Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972) 11

Natural Resources Defense Council v. SEC, 389 F. Supp. 689 (D.C.D.C. 1974) 17

Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) 10

San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) 10

Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974) 11, 12

Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973) 12

Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) 11, 12

Page

United States v. S.C.R.A.P., 412 U.S. 669 (1973) 13, 14

Upper Pecos Association v. Peterson, 409 U.S. 1021 (1972) 11

Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971) 11

Statutes:

Airport and Airway Development Act of 1970, 49 U.S.C. §§ 1716(c) (1) and (3) 11

Atomic Energy Act of 1954, 42 U.S.C. § 2133(a) 10

Crime Control Act of 1973, 42 U.S.C. § 3733(a) 12

Federal-Aid Highway Act of 1956, 23 U.S.C. § 106(a) 11

Federal Power Act, 16 U.S.C. § 803 9

Housing Act of 1949, 42 U.S.C. § 1450 *et seq.* 10

Housing and Urban Development Act of 1968, 12 U.S.C. § 1715z-1 (j) (5) 11

Interstate Commerce Act, 49 U.S.C. § 15(7) 13, 14

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, *et seq* 3, 7

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703(a) (1) 4

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1706(a) 2, 3, 15

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1706(b) 3, 4, 15

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1706(d) 3, 4, 15

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1716 ..... 3, 4, 8

National Environmental Policy Act of 1969, 42 U.S.C. §§ 4332 (2) (C)-4335 ..... 3, 14

	Page
National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2) (C)	8, 13, 16
Public Works and Economic Development Act of 1965, 42 U.S.C. § 3142(b)	10
Public Works and Economic Development Act Amendments of 1971, 42 U.S.C. § 3131(a)	12
Securities Act of 1933, 15 U.S.C. § 77a, *et seq*	3, 7, 18
Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501, *et seq*	12
25 U.S.C. § 415(a) (Lease, Sale, or Surrender of Allotted or Unalloted Lands)	9
28 U.S.C. § 1254(1) (Supreme Court Jurisdiction)	2
28 U.S.C. § 1331(a) (District Court Jurisdiction)	5
Miscellaneous:	
111 Congressional Record 27310-11 (1965)	7
113 Congressional Record 315-16 (1967)	7
114 Congressional Record 15270 (1968)	7
Council on Environmental Quality Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.8	18
Council on Environmental Quality Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.9(f)	16
1973 HUD Statistical Handbook 292	17
Licensing of Production and Utilization Facilities, 10 C.F.R. Part 50, Appendix D, Section D.3	10
S. Rep. No. 1123, 90th Cong., 2d Sess. at 110 (1968)	7
40th Annual Report, Securities and Exchange Commission 167	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

FLINT RIDGE DEVELOPMENT COMPANY,
*Petitioner**

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Flint Ridge Development Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on 30 July 1975.

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*Counsel for petitioner has been advised that the Solicitor General of the United States will file a petition for a writ of certiorari in this case on behalf of the Secretary of Housing and Urban Development.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It appears as Appendix A. The opinion of the District Court is reported at 382 F.Supp. 69 (E.D. Okla. 1974). It appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered 30 July 1975. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether there is "major Federal action[] significantly affecting the. . .environment" requiring an environmental impact statement under the National Environmental Policy Act in connection with the filing of a registration-antifraud disclosure statement under the Interstate Land Sales Full Disclosure Act where the Department of Housing and Urban Development's authority is limited to checking to determine whether the statement appears to be complete and accurate on its face.

2. Whether the environmental impact statement requirement of the National Environmental Policy Act overrides section 1706(a) of the Interstate Land Sales Full Disclosure Act which affirmatively authorizes interstate land sales 30 days after filing a registration-antifraud disclosure statement complete and accurate on its face with the Department of Housing and Urban Development when 30 days is not long enough to complete an environmental impact statement.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4332(2)(C) - 4335, and the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. §§ 1706(a), (b), and (d) and 1716, are set forth in Appendix C.

STATEMENT OF THE CASE

This case arises out of a determination of the Secretary of Housing and Urban Development that the filing of a registration-antifraud disclosure statement by a developer pursuant to the Interstate Land Sales Full Disclosure Act does not require preparation of an environmental impact statement under the National Environmental Policy Act of 1969 (NEPA).

The Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. § 1701, *et seq.*, directly patterned after the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, was passed to eliminate fraud in interstate land sales. Under § 1706(a) of ILSA, the sale of lots in interstate commerce can begin 30 days after the developer files a registration-antifraud disclosure statement (statement of record) with the Department of Housing and Urban Development (HUD). The statement of record thus automatically becomes "effective" 30 days after filing. If it appears to HUD that the statement of record is

incomplete or inaccurate on its face, its effective date can be suspended, which has the effect of preventing sales from commencing, until 30 days after the developer corrects its statement of record. ILSA § 1706(b). If it appears to HUD that an effective statement of record is fraudulent, it may be suspended, which has the effect of halting sales, until the developer corrects its statement of record. ILSA § 1706(d).

The developer is required to furnish to purchasers prior to sale a portion of the statement of record filed with ILSA, called a property report, which contains necessary information, such as condition of the title, existence of roads and utilities, range of selling prices, upon which a purchaser can make his or her own determination of the economic value of the lot. ILSA § 1703(a)(1).

ILSA provides that the fact that a statement of record has been filed or is in effect "... shall not be ... held to mean that the Secretary has in any way passed upon the merits of, or given approval to, such subdivision." ILSA § 1716.

Petitioner Flint Ridge Development Company (Flint Ridge) is a private joint venture organized to develop and sell lots in a subdivision located in eastern Oklahoma.

In May 1973, after site selection, financing, and planning, the construction of utilities, roads and other common improvements in the development began [R533].

In February 1974, Flint Ridge filed its statement of record with HUD [R691]. Within 30 days HUD notified Flint Ridge that its statement of record was incomplete and inaccurate on its face [R694]. On 2 May 1974, 30 days after filing its corrections, Flint

Ridge's statement of record became effective by operation of law [R690].

Respondents, environmental groups, in the interim, filed a demand on HUD that prior to "approval" of Flint Ridge's statement of record, HUD must prepare an environmental impact statement on the development [R693]. HUD determined that an environmental impact statement was not required because its checking of a statement of record and requiring correction thereof was not a major Federal action significantly affecting the environment [R696].

Respondents filed a complaint in the District Court on 21 April 1974 seeking judicial review of HUD's determination. The District Court concluded that it had jurisdiction, apparently under 28 U.S.C. § 1331(a).

The District Court suspended the effectiveness of Flint Ridge's statement of record, prohibited public sale of lots thereunder, and enjoined HUD from "approving" the statement of record until HUD prepared an environmental impact statement.[1] The District Court did not find, however, that Flint Ridge's statement of record which became effective 2 May 1974 was incomplete, inaccurate or fraudulent.

The Court of Appeals affirmed in pertinent part on the ground that "major federal action significantly

[1] The District Court conducted a trial on the environmental impact of the Flint Ridge Development. Among other things, it found and the Court of Appeals recited that seepage from septic tanks in the development would pollute the Illinois River – notwithstanding Oklahoma State Law regulating septic tanks and prohibiting pollution therefrom. This finding was not appealed *only* because Flint Ridge maintains that it is irrelevant to the issues.

affecting. . . the environment was present" because of "the consequences of the government's approval of the statement [of record] in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses. . . ." (App. A, *infra*, p. 9a). The Court of Appeals also found that there was no conflict between the ILSA provision which automatically authorizes sales 30 days after filing or correction of a statement of record and the environmental impact statement requirement of NEPA which concededly could not be satisfied in 30 days because "[t]here is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement." (App. A, *infra*, p. 9a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ERRONEOUSLY CONVERTS THE NEPA STANDARD OF MAJOR FEDERAL ACTION INTO *ANY* FEDERAL ACTION AND THUS HIGHLIGHTS THE IMMEDIATE NEED FOR GUIDANCE BY THE COURT ON WHAT FEDERAL ACTIVITIES DO *NOT* CONSTITUTE "MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING. . . THE ENVIRONMENT" REQUIRING AN ENVIRONMENTAL IMPACT STATEMENT.

The decision below is one of first impression in finding major Federal action significantly affecting the environment solely because of ". . . the consequences of the government's *approval* of the statement [of record]

in terms of *ease* of *obtaining funds* and in terms of the ultimate direct consequences on the environment of the building of the houses. . . " (Emphasis supplied) (App. A, *infra*, p. 9a). The organic statute involved, however, specifically disclaims "approval" by the government and only allows the government to review a private party's antifraud disclosure document. The Court of Appeals erroneously attempts to treat its decision as a modest extension of existing case law when in fact it is a wide departure. In attempting to rationalize the true implications of its decision, the Court of Appeals relies solely on cases which are inapposite, and if anything suggest that major Federal action is *not* involved in this case. All of the cases relied upon by the decision below involved organic statutes granting Federal control over, direct involvement in, or approval and funding of private activities that affect the environment.

In the Congressional debates, Senator Williams, the chief sponsor, described the Interstate Land Sales Full Disclosure Bill as follows:

> "It is not a regulatory statute which will permit the Federal Government to pass upon such questions as land value, its selling price, land use, or zoning. The only purpose of this legislation is to give the purchaser the necessary information upon which he can make his own investment decision."
>
> 114 Cong. Rec. 15270 (1968); *See also*, S. Rep. No. 1123, 90th Cong., 2d Sess. at 110 (1968).

The Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. § 1701, *et seq.*, directly patterned after the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*,[2] was

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[2] 111 Cong. Rec. 27310-11 (1965) (remarks of Sen. Williams introducing S.2672, the Interstate Land Sales Full Disclosure Bill); 113 Cong. Rec. 315-16 (1967) (remarks of Sen. Williams reporting S.275, the Interstate Land Sales Full Disclosure Bill,

passed to eliminate fraud in interstate land sales. Under ILSA, the land developer files a registration-antifraud disclosure statement (statement of record) with the Department of Housing and Urban Development (HUD). HUD reviews the statement of record for completeness and accuracy on its face. Under ILSA, HUD has no authority whatsoever over the land developer, or purchasers of its land, other than the accuracy and completeness of the statement of record and fraud.

ILSA, which governs the contents of a statement of record provides:

> "The fact that a statement of record with respect to a subdivision . . . is in effect shall *not* . . . be held to mean . . . [HUD] has in any way *passed upon* the merits of, or given *approval* to, such subdivision."
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> 15 U.S.C. § 1716 (Emphasis supplied).

If the disclosure requirements of ILSA are met by the developer, HUD has no discretion whatsoever, except that it may shorten the period in which a statement of record becomes effective.

The National Environmental Policy Act of 1969 (NEPA) commands "all agencies of the Federal Government" to prepare an environmental impact statement whenever they propose to undertake "major Federal actions significantly affecting the . . . environment." 42 U.S.C. § 4332(2)(C).

The court below based its finding of major Federal action on three lines of cases which involved matters

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out of Committee). The bills introduced in 1965 and 1967 contained provisions that would have entrusted administration of land sales disclosure to the Securities and Exchange Commission. *Id.*

"*similar* to that here presented," a condition "*not far different* from ours" and an "*analogy*" (App. A, *infra*, pp. 7a, 8a) (Emphasis supplied), thus treating its decision as no more than a modest extension of existing law rather than what it is – a radical departure. Each of the organic statutes involved in the cases relied upon by the court below provides Federal control over, involvement in, or approval and funding of the project. They stand in stark contrast to ILSA, which gives HUD no such authority.

The principal case relied upon by the court below as "similar" is *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972). This case involved a lease of "restricted" Indian lands. The relevant portion of the organic statute, however, provides:

> "Any restricted Indian lands . . . may be leased by the Indian owners, with the **approval** of the Secretary of Interior . . . and all leases and renewals shall be made under such **terms and regulations** as may be **prescribed** by the **Secretary** of the Interior."
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> 25 U.S.C. § 415(a) (Emphasis supplied).[3]

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[3]The organic statute in Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), in pertinent part provides:

> "[a]ll licenses issued . . . shall be on the following conditions: (a) That the project adopted . . . shall be such as in the **judgment** of the Commission will be best adapted to a comprehensive plan . . . and if necessary . . . the Commission shall have authority to **require the modification** of any project . . . before **approval**." 16 U.S.C. § 803 (Emphasis supplied).

The organic statute in Izaak Walton League of America v. Schlesinger, 337 F.Supp. 287 (D.C. D.C. 1971), in pertinent part provides

The eight cases involving conditions "not far different from ours" include *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973). However, that court described the organic statute as follows:

> "The provisions of the Housing Act of 1949, 42 U.S.C. § 1450 et seq., . . . enable basically a contractual relationship between a locality and HUD . . . . A loan or a grant, or both, may be made from the federal government to the locality. The Secretary may establish reasonable requirements for the program which must be complied with prior to the entering into [sic] a contract with the locality. These requirements operate as conditions precedent to the formation of the contract. § 1453. . . . This statutory scheme thus provides for local adoption of a plan, **adjustment** of the **plan to meet HUD requirements** and finally entry into an **enforceable contractual relationship with HUD.**"

472 F.2d at 1023, n.1 (Emphasis supplied).[4]

"[s]uch licenses [construction of nuclear reactors] shall be issued . . . subject to such **conditions** as the Commission may by rule or regulation establish . . ." 42 U.S.C. § 2133(a) (Emphasis supplied).

The regulation at issue in *Schlesinger*, 10 C.F.R. Part 50, Appendix D, Section D.3, in pertinent part provided

> ". . . the Commission may issue a license for limited operation after **consideration** and **balancing** of the factors . . . and upon making the appropriate **findings** on the matters specified . . . ." (Emphasis supplied).

[4]The organic statute in Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973), in pertinent part provides:

> "[f]inancial assistance under this section shall be on such **terms and conditions** as the Secretary **determines** . . ." 42 U.S.C. § 3142(b) (Emphasis supplied).

The organic statute in Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973), is the Housing Act of 1949 discussed under San Francisco v. Romney, *Id.*

The principal case relied upon by the court below as providing an "analogy" is *Sierra Club v. Lynn*, 502

The organic statute in Silva v. Romney, 473 F.2d 287 (1st Cir. 1973), in pertinent part provides:

> "[t]he property or project shall – (A) comply with such **standards and conditions** as the **Secretary** may **prescribe** to establish the acceptability of the property for mortgage insurance . . . ." 12 U.S.C. § 1715z-1(j)(5) (Emphasis supplied).

The organic statute in Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972), in pertinent part provides for the

> ". . . **approval** [by the Secretary of Commerce of] **surveys, plans, specifications** and **estimates** [of proposed highway projects]." 23 U.S.C. § 106(a) (Emphasis supplied).

The organic statute in City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972), in pertinent part provides:

> "[a]ll airport development projects shall be subject to the **approval** of the Secretary, which approval may be given only if he is **satisfied** that . . . [and] [n]o airport development project may be **approved** by the Secretary unless he is **satisfied** that fair consideration has been given to the interest of communities in or near which the project may be located." 49 U.S.C. §§ 1716(c)(1) and (3) (Emphasis supplied).

The organic statute in Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971), vacated and remanded to determine mootness, 409 U.S. 1021 (1972), in pertinent part provides that the Secretary of Commerce is authorized to make grants

> ". . . if he **finds** that – (A) the project for which financial assistance is sought will directly or indirectly . . . primarily benefit the long-term unemployed and members of low-income families or otherwise substantially further the

F.2d 43 (5th Cir. 1974). That court, however, described the operation of the organic statute (Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501, *et seq.*) as follows:

> "After a developer has successfully traversed the application process and accepted an offer of commitment, **the terms and conditions** under which he must operate **are negotiated with HUD and executed in a project agreement.** A trust indenture and a development plan must set out . . .(iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, ars [sic] enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in any part of the development plan require **approval by the Secretary.**"
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> 502 F.2d at 53.[5]

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objectives of the Economic Opportunity Act of 1964 . . ." 42 U.S.C. § 3131(a) (Emphasis supplied).

The organic statute in Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), in pertinent part provides that

> "[t]he Administration shall make grants . . . [for an] **approved** comprehensive State plan . . . No state plan shall be **approved** as comprehensive unless the Administration **finds** that the plan provides for the allocation of adequate assistance to deal with law enforcement . . . ." 42 U.S.C. § 3733(a) (Emphasis supplied).

The court found that the agency could impose conditions as to the making of a grant. 451 F.2d at 1135 and 1137.

[5]The organic statute in Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973), was the same as that in Silva v. Romney, *op. cit.*

Thus, the decision below poses the fundamental policy question of whether a Federal agency which has no substantive responsibility for, or authority over, those activities of a private party which affect the environment is required by the National Environmental Policy Act to bar sales until the agency completes an environmental impact statement on those private activities.

2. BY FRUSTRATING THE STATUTORY SCHEME OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT, THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE ANNOUNCED BY THE COURT IN SCRAP I THAT NEPA DOES NOT SUB SILENTIO AMEND OR REPEAL BY IMPLICATION ANY OTHER STATUTE.

In *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973) (SCRAP I), the Court faced the question of whether the National Environmental Policy Act (NEPA) sub silentio amended or repealed by implication section 15(7) of the Interstate Commerce Act. The District Court enjoined the Interstate Commerce Commission (ICC) from permitting and the railroads from collecting an interim surcharge on transportation of recyclable goods on the ground that the ICC orders refusing to suspend the surcharge were unlawful under section 102(2)(C) of NEPA because they constituted major Federal action significantly affecting the environment for which the ICC had not prepared an environmental impact statement. The District Court found that NEPA empowered it to issue the injunction notwithstanding the holding in *Arrow Transportation Co. v. Southern Ry.*

Co., 372 U.S. 658 (1963), that section 15(7) vested in the ICC the sole and exclusive power to temporarily enjoin collection of rates and withdrew such power from the judiciary. The Court concluded that NEPA did not repeal by implication section 15(7) of the Interstate Commerce Act:

> "The statutory language, in fact, indicates that *NEPA was not intended to repeal by implication any other statute.* Thus, 42 U.S.C. § 4335 specifies that '[t]he policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies,' and 42 U.S.C. § 4334 instructs that the Act 'shall [not] in any way affect the specific statutory obligations of any Federal agency. . . .' Rather than providing for any wholesale overruling of prior law, NEPA requires all federal agencies to review their 'present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of [NEPA] and shall propose to the President . . . such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in [NEPA].' 42 U.S.C. § 4333. It would be anomalous if Congress had provided at one and the same time that federal agencies, which have the primary responsibility for the implementation of NEPA, must comply with present law and ask for any necessary new legislation, but that the courts may simply ignore what we described in *Arrow* as 'a clear congressional purpose to oust judicial power . . . .' "
>
> 412 U.S. at 694-95 (Emphasis supplied and footnotes omitted).

ILSA is a carefully devised statutory scheme to prevent fraud without imposing stifling regulatory burdens on the economically important business of interstate land sales. The statutory scheme is a simple one. The developer must file a registration-antifraud disclosure statement called a statement of record with HUD. Section 1706(a) of ILSA provides for a statement of record to *automatically* become "effective" 30 days after filing and the developer may then begin sales. Under section 1706(b), the effective date of a developer's statement of record can be suspended only if a statement of record appears to HUD to be ". . . on its face incomplete or inaccurate in any material respect . . . ." In that event, the effective date is suspended only until 30 days after the developer files the necessary corrections in its statement of record. Under section 1706(d), an effective statement of record can be suspended only if it contains an untrue statement of material fact or omits a material fact. In that event, the statement of record remains suspended only until the developer files the necessary corrections. The effect of suspension is to stop sales from beginning or halt sales in progress. The power of HUD to suspend, therefore, comes into play *only* if the *developer* fails to make the required disclosure – and not because of anything HUD either does or fails to do. HUD has no discretion to suspend a statement of record for any other reason. ILSA neither requires nor allows HUD to make any judgment about the merits of the underlying development. Congress thus devised a statutory scheme that gives HUD suspension power to prevent fraud but erects a barrier against *Government caused delay* beyond the initial 30 day period.

It is undisputed that an environmental impact statement under NEPA cannot be completed in 30 days.[6] Thus, ILSA gives HUD 30 days to act, absent incomplete disclosure, but HUD cannot complete an environmental impact statement in 30 days.[7] The decision below concludes that the effective date of a statement of record must be suspended beyond the 30 days *solely* because HUD must first complete an environmental impact statement. This results in an open-ended delay in bringing land to market. The statutory scheme of ILSA that authorizes a developer to begin sales 30 days after filing or correcting a statement of record and prohibits Government caused delay thereafter is repealed by the decision below.

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[6]The Council on Environmental Quality Guidelines for Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.9(f), which are advisory, state that other Federal agencies, which must be consulted under § 102(2)(C) of NEPA, should be given not less than 45 days to comment on the draft environmental impact statement.

[7]The decision below suggests that this operational conflict between ILSA and NEPA could be accommodated in the following way:

> "Thus, a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement." (App. A, *infra*, p. 9a).

In order to begin preparing an environmental impact statement, however, HUD must at the very least know what a developer plans to do with the land, including the size, location and number of lots, utilities, sewers, roads and other improvements. When a developer knows that information he is prepared to file his statement of record. Thus, if the developer refrains from filing in order to give HUD "advance notice," the Government caused delay is merely shifted forward.

There is no reason, however, to frustrate the statutory scheme of ILSA in order to provide for environmental disclosure. For example, HUD could initiate a rulemaking proceeding to require environmental disclosure in statements of record – consistent with the statutory scheme of ILSA. *See, Natural Resources Defense Council v. SEC*, 389 F.Supp. 689 (D.C. D.C. 1974). Respondents requested no such relief from HUD or from the District Court.

The decision below defeats the statutory scheme of ILSA and thus conflicts with the principle announced by the Court in SCRAP I that NEPA does not repeal by implication any other statute.

3. THE SIGNIFICANCE OF THE ISSUES BEFORE THE COURT AND THE MAGNITUDE OF THE ERROR BELOW IS UNDERSCORED BY THE WIDE IMPACT OF THE DECISION BELOW.

In the year ended 31 December 1973, 3,568 statements of record were filed with HUD under ILSA.[8] The decision below would not only immediately bring to a halt for an indefinite period of time the enormous land sales industry presently subject to ILSA but would *also* build in substantial delay into all such future projects.

HUD's duties and powers under ILSA are precisely the same with respect to each development that is

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[8]1973 HUD Statistical Handbook 292.

subject to the registration-antifraud disclosure requirements met by filing a statement of record. The decision below prohibits the Flint Ridge Development Company from selling lots until HUD prepares an environmental impact statement under NEPA. Thus, except in the rare case where it can be shown that a development will have an insignificant effect on the environment or some statutory registration exemption is available, sales of *any* lots in the United States cannot begin until HUD completes an environmental impact statement on those developments.

One need only examine the Council on Environmental Quality's Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. §1500.8, to conclude that independent analysis of the mass of information and data required in an environmental impact statement is a substantial job. When this is combined with the requirements for interagency review, the experience of Federal agencies demonstrates that an adequate environmental impact statement cannot be expected to be completed in less than a year.

ILSA was patterned directly after the Securities Act of 1933. The Securities Act of 1933 also requires the filings of a registration-antifraud disclosure statement as a prerequisite to use of the means of interstate commerce for the sale of securities subject to the Act. In the fiscal year ended 30 June 1974, 2,890 registration statements were filed with the Securities and Exchange Commission under the Act.[9] The decision below is direct precedent for not only immediately interrupting for an indefinite period of

[9] 40th Annual Report, Securities and Exchange Commission 167.

time access to the public securities market for funds for industrial and housing construction that significantly affects the environment but *also* for building in substantial delay in all such future financing and construction while the Securities and Exchange Commission prepares environmental impact statements.

The one or more years' delay imposed on land development projects will result in substantial additional interest costs during the time required for HUD to complete environmental impact statements. It is difficult to determine the ultimate number of developers who will be thrown into bankruptcy by this unanticipated burden of delay, particularly in present market conditions. At the very least, the decision below will substantially delay present *and* future land development. In some cases it will result in outright abandonment.

Particularly in this time of drastic unemployment and critical need for additional capital for plant and housing construction, our economy cannot risk the burden imposed by the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

HARRY A. RISSETTO
THOMAS C. WATSON
EDWIN KRONFELD
1800 M Street, N.W.
Washington, D.C. 20036

F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Counsel for Petitioner

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

2 October 1975

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 74-1520 and 74-1750

Filed: July 30, 1975

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, Plaintiffs-Appellees,	)	
v.	)	
JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, Defendants-Appellants,	)	Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 74-131-C)
and	)	
FLINT RIDGE DEVELOPMENT COMPANY, Intervening Defendant-Appellant.	)	

Andrew T. Dalton, Jr. and James Khourie (James Ikard, on the brief), for Plaintiffs-Appellees.

Charles E. Biblowit, Attorney, Department of Justice (Wallace H. Johnson, Assistant Attorney General, and

Carl Strass and Dennis A. Dutterer, Attorneys, Department of Justice, on the brief), for Defendants-Appellants.

Thomas C. Watson of Morgan, Lewis & Bockius and F. Paul Thieman, Jr. of Crowe and Thieman (Edwin Kronfeld of Morgan, Lewis & Bockius and Gordon B. Cecil of Crowe & Thieman, on the brief), for Intervening Defendant-Appellant.

Before LEWIS, Chief Judge, and McWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is an appeal from an order, judgment and decree of the United States District Court for the Eastern District of Oklahoma in which the defendants-appellants were enjoined pending the preparation of an environmental impact study "of the effects of the Flint Ridge Development on the quality of the human environment" by the Secretary of Housing and Urban Development and Office of the Interstate Land Sales Registration, a division of the Department of Housing and Urban Development. The essential holding of the trial court was that the responsibilities of the Department of Housing and Urban Development were of such a nature as to require the preparation of an impact statement pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 et seq.

The action herein was filed on April 24, 1974 by the Scenic Rivers Association and the Illinois River Conservation Council. Named as defendants were Lynn, Secretary of the Department of Housing and Urban Development (HUD) and Bernstein, Administrator of the Office of Interstate Land Sales Registration (OILSR). In this suit a declaratory judgment was sought that HUD must conduct an environmental study and file an impact statement prior to its approval of a filing with the OILSR. Also sought was an injunction pending a determination in the case, together with the issuance of a mandatory order compelling the Secretary to comply with NEPA. In addition, plaintiffs sought a preliminary injunction requiring HUD to withdraw approval of the statement of record and property report which had been filed by Flint Ridge Development Company on February 5, 1974.

Flint Ridge was engaged in developing an area along the Illinois River in Oklahoma. In order to do so it was required to file certain documents under the Interstate Land Sales Act, 15 U.S.C. § 1701 et seq. This is a prerequisite to the sale of lots in commerce. The original filing of Flint Ridge was determined to be inadequate and an amended statement of record was filed by Flint Ridge. This was effective as of May 2, 1974, that is, after the filing of the present lawsuit.

The order that is now being reviewed was issued following a hearing on preliminary injunction on July 31, 1974. Flint Ridge had been allowed to intervene and the hearing on injunction was merged with the hearing on the merits. Evidence was presented, and on August 2, 1974, the ruling from the bench which was later formalized in findings and opinion held that HUD was required to prepare an impact statement. The court

further ordered that the Flint Ridge statement be suspended. Later, on September 4, 1974, the trial court filed its findings of fact and conclusions of law and an order. This enjoined HUD and OILSR from approving the Flint Ridge filing until an environmental impact study had been prepared and a hearing held thereon. The court ordered immediate withdrawal of the approval which had been given May 2 and ordered defendants-appellants to comply with the NEPA procedures.

The effect of the court's orders suspending the statement of record was that it forbade interstate sales until further order of the court. Unquestionably the development would have had a substantial impact on the environment inasmuch as the Illinois River is a state-designated scenic river. Three thousand lots were to have been sold. On each would have been a home with a septic tank for disposal of human refuse, which refuse would have contaminated the river. The trial court considered this fact in determining that the filing with HUD and OILSR was major federal action which would significantly affect the quality of the human environment.

The government agencies and Flint Ridge are the appellants in the present proceedings. They contend that the court erred:

1) In holding that the filing under the Interstate Land Sales Act constituted major federal action;

2) In ruling that an impact statement had to be prepared prior to the approval of a filing. The contention was here that to so read the National Environmental Policy Act is to create an irreconcilable conflict between NEPA and the Interstate Land Sales Act;

3) In requiring a public hearing;

4) In ruling that there was jurisdiction to consider the question as to whether NEPA limited the Interstate Land Sales Act and to enjoin the actions of HUD and OILSR in deference to the provisions of NEPA.

I.

The first question is whether NEPA applies to the actions of the OILSR. The relevant provision of NEPA requires that "to the fullest extent possible" all agencies of the Federal Government shall prepare a detailed environmental impact statement for all "major Federal Actions significantly affecting the quality of the human environment."[1] The defendants-appellants take the

[1] The relevant NEPA provision as read in context furnishes a better picture of its requirements:

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

position that review of the statements of record which are required to be filed under the Interstate Land Sales Act does not constitute major federal action. As we have above shown, the district court disagreed with this and enjoined OILSR from approving the statement of record until it had filed an impact statement. Therefore, the question boils down to whether the action on the part of OILSR constitutes a major federal action significantly affecting quality of the human environment. The argument is that the action is largely a private one involving as it does the filing of the statement, but it is more than that because OILSR does have the authority to suspend a statement, the effect of which is to cut off raising funds in interstate which would be otherwise available. Thus, this allows the Federal Government to suspend a private action which would unquestionably affect the environment.

Our decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) dealt with a matter which was very similar to that here presented. A 99-year lease of Indian lands was executed by the Pueblo of Tesuque. The lease was to the Sangre de Cristo Development Company, Inc. as lessee. The district court there held that the Secretary of the Interior was not required to file an impact statement prior to approval or disapproval of a lease between the Tribe and the developer. The trial court was impressed by the fact that the United States had not initiated the lease, was not a party, had no interest and the government action was limited to approval or disapproval. Our court reversed. holding that the Secretary's authority to ratify or reject leases on Indian lands would come within the terms of NEPA. The opinion quoted the broad purposes of NEPA as set forth in 42 U.S.C. § 4331(b) as showing the intention

of Congress to preserve the environment.[2] Cited with approval was Greene County Planning Board v. Federal Power Comm'n, 455 F.2d 412 (2d Cir. 1972), holding that the granting of a license to construct a high voltage line constituted major federal action. Also relied on was Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971), requiring the Atomic Energy Commission to prepare an environmental impact statement before issuing an interim operating license for a nuclear power plant.

The similarity between our case and *Davis* is that both involve filing and approval of private action. The result of approval here is that the developer is free to seek funds in commerce for the development. In each instance the filing is a preliminary step which is followed by substantial consequences to the environment; thus, there is action which leads to the development which in turn affects the human environment.

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[2] The court said:

> [I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; . . . .

469 F.2d at 596.

There are many cases which hold that the impact resulting from governmental funds is capable of significantly affecting the quality of the environment, a condition which is not far different from ours.[3]

It is true that funding could be obtained within the State of Oklahoma even without approval, but obviously the obtaining of funds interstate is important. If it were not important, Flint Ridge would not be litigating the present issue.

An analogy is shown in the case of the giving of a guarantee by HUD. This has a significant affect. *See* Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974); Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973). *See, also,* National Resources Defense Council, Inc. v. S.E.C., 389 F. Supp. 689 (D.D.C. 1974) in which it was held that NEPA applies to S.E.C. offerings. The filing with the

[3] *See* Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) (Economic Development Administration loan commitment to finance a portion of construction costs for expanding a private plant); Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) (HUD loan and grant); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) (HUD mortgage guarantee and interest grant for private housing project); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) (HUD loan and grant); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972) (Department of Transportation determination to fund highway); City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972) (Federal Aviation Agency funding for airport extension); Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971), *vacated and remanded on other grounds*, 406 U.S. 944 (1972) (Economic Development Administration grant for construction of highway); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (Law Enforcement Assistance Administration approval of funds for construction of rehabilitation center).

S.E.C. is not dissimilar to a filing under the Interstate Land Sales Act.

In sum, then, the consequences of the government's approval of the statement in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses lead to the conclusion that the district court was correct in holding that major federal action significantly affecting the quality of the human environment was present.

II.

Appellants further maintain that the Interstate Land Sales Act is by its terms inconsistent with NEPA in that it requires that the statement of record filed by the land developer become effective 30 days after it is filed unless the agency acts to suspend it, whereas the NEPA procedure has a minimum requirement of 75 days. The argument goes that it is impossible for the Office of Interstate Land Sales to comply. We regard this as superficial. Clearly, Congress put the automatic 30 day provision in the Act out of concern about possible delay of agency action and in turn the interstate land sales. There is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement. The First Circuit has suggested that HUD promulgate regulations designed to preserve the status quo during the period of preparation of the impact statement. *See* Silva v. Romney, 473 F.2d 287 (1st Cir. 1973). Thus, a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its

impact statement. There is evidence that Congress never intended for the 30 day provision to be absolute so as to exclude the applicability of NEPA; evidence the fact that it allowed the statement of record to be suspended.

The other argument advanced is that Congress showed its intention that the NEPA requirement was not applicable. This again loses sight of the fact that the NEPA impact statement requirement applies to virtually all federal agencies and is not limited to those that are concerned with the environment. One of its purposes is to require the giving of attention to environmental problems regardless of whether the agency has authority to do anything about it.[4]

The Supreme Court has held in one case that the ICC was not required to prepare an impact statement. *See* United States v. S.C.R.A.P., 412 U.S. 669 (1973). The ICC had refused on a temporary basis to suspend a proposed rate increase. While it was determining whether the rate increase ought to be suspended permanently, the district court enjoined it from approving the rate increase as to recycled goods until it had filed a NEPA impact statement. By the terms of the statute, however, the rate suspension question was placed in the exclusive jurisdiction of the ICC during

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[4] *See* Jones v. Lynn, 477 F.2d 885, 891 (1st Cir. 1973); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

the seven month consideration period as to whether the rate should be suspended. The Supreme Court had so construed the statute in Arrow Transportation Co. v. Southern Ry. Co., 372 U.S. 658 (1963). The fact that the Supreme Court decided to review this case and thus regarded the question whether the ICC *might* have to file a NEPA statement shows the broad sweep and range of the NEPA requirement and demonstrates that it is not to be lightly disregarded. Certainly the presence of the 30-day requirement does not create inconsistency or an impediment to requiring the agency to prepare an impact statement.

Finally, it is readily apparent that these statutes, NEPA and Interstate Land Sales, are not incompatible. Both are designed to give information to the public, but in each instance it is a different kind of information. Rather than being inconsistent or incompatible they complement one another in furnishing the public with a full range of information.

III.

Did the district court lack jurisdiction to hear and determine this matter as a federal question case? We have heretofore recognized that the district court is authorized to entertain a case such as this one arising under federal law. *See* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971). We there held that the National Helium Corp. could challenge the termination of government contracts, which terminations were taking place without first observing the requirements of NEPA. In that instance also it was by way of the injunction. National Helium recognized that

the underlying substantive federal question was the NEPA requirement. Also, our decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) impliedly held that several kinds of federal violations gave rise to district court jurisdiction to compel the government agency to comply with the mandates of NEPA.

Flint Ridge maintains, however, that the Interstate Land Sales Act has a provision for review by the court of appeals and that this precludes district court action. This statute declares.

> Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may obtain a review of such order or determination in the court of appeals of the United States . . . by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part . . . Upon the filing of such petition, the jurisdiction of the court shall be exclusive . . . .

15 U.S.C. § 1710(b).

Thus, this act provides for hearings on the request of a developer when the Secretary suspends the statement prior to its effective date for the purpose of obtaining additional information and, too, for review of an order of the Secretary when he wishes to suspend a statement of record already in effect. 15 U.S.C. § 1706(b) and (d). Such hearings are public ones in which a record is made.

It is plain from a reading of the statute that this procedure does not apply here because the agency action for which review is provided has not here taken place and could not take place because it is entirely out of context with the present problem.

Nor does Anaconda v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973) apply. In *Anaconda* the effort was to bypass review by the appropriate court of appeals.

We have examined the other decision relied on, namely, Environmental Defense Fund v. Environmental Protection Agency, 485 F.2d 780 (D.C. Cir. 1973). That one is also plainly inapplicable.

The Supreme Court's decision in *S.C.R.A.P., supra,* is entirely consistent with the position we take because there the effort was to interfere with the decision of an administrative tribunal which Congress and the Supreme Court had recognized was within the exclusive jurisdiction of the tribunal.

The case of Adolphus v. Zebelman, 486 F.2d 1323 (8th Cir. 1973) has recognized that a district court has jurisdiction to enjoin a developer from making interstate land sales when its statement of record violates the Act.

Because, then, of the broad scale application of NEPA and the manifest intention of Congress that all federal agencies with responsibilities which effect the environment must observe its requirements, the jurisdiction of the district court is present.[5]

IV.

Was the district court correct in its ruling that there should be a public hearing in connection with the

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[5] We deem it unnecessary to discuss the issue of standing because it is not seriously contended that the plaintiffs here lacked standing to bring the suit.

environmental impact statement? We agree with HUD that the question whether a public hearing is to be held is within the agency's discretion. The statute does not prescribe that the hearing be either public or adversary. The courts have consistently held to this proposition.[6]

HUD's proposed regulations do not require public hearings in all cases, and the Proposed Rules § 50.20 hold that the question whether a public hearing shall be held on a draft environmental impact statement is an administrative decision. This regulation outlines the factors to be considered: magnitude of the proposal, degree of interest, complexity of the issue and the extent to which public involvement has been achieved. The appellees contend that the Flint Ridge development meets all the criteria. As noted, however, this is an agency question. The present action is to compel compliance with the mandatory requirements of NEPA. Obviously the holding of a public hearing is not mandatory.

The judgment of the district court is affirmed in all respects except the requirement of a public hearing. That holding is reversed.

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[6] Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Natural Resources Defense Council, Inc. v. TVA, 367 F. Supp. 128 (E.D. Tenn. 1973), *aff'd*, 502 F.2d 852 (6th Cir. 1974); Ford v. Train, 364 F. Supp. 227 (W.D.Wis. 1973); Citizens for Clear Air, Inc. v. Corps of Engineers, U.S. Army, 356 F. Supp. 14 (S.D.N.Y. 1973); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y. 1972); San Francisco Tomorrow v. Romney, 342 F. Supp. 77 (N.D. Cal. 1972), *rev'd in part on other grounds*, 472 F.2d 1021 (9th Cir. 1973).

Before The Honorable David T. Lewis, Chief Judge, The Honorable Robert H. McWilliams and The Honorable William E. Doyle, Circuit Judges

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations,	)	
Plaintiffs-Appellees,	)	
vs.	)	No. 74-1520
	)	No. 74-1750
JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development,	)	(D.C. No. 74-131-C)
Defendants-Appellants,	)	
and	)	
FLINT RIDGE DEVELOPMENT COMPANY,	)	
Intervening Defendant-Appellant.	)	

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in all respects except

the requirement of a public hearing. The district court's ruling that there should be a public hearing is reversed. The cause is remanded to the United States District Court for the Eastern District of Oklahoma for further proceedings consistent with the opinion of this Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, Plaintiffs, vs. JAMES T. LYNN, Secretary of Housing and Urban Development and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, Defendants, and FLINT RIDGE DEVELOPMENT CO., a joint venture, Intervening Defendant, and THE UNITED STATES OF AMERICA, ex rel The Environmental Protection Agency, Additional Defendant.	)	No. 74-131-C Filed: September 4, 1974

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statement of Case

The Scenic Rivers Association of Oklahoma, an Oklahoma non-profit corporation, and The Illinois River Conservation Council, Inc., a non-profit Oklahoma

corporation, filed this action in this court for the following reasons:

1. Plaintiffs seek a declaratory judgment decreeing that the Department of Housing and Urban Development, the agency in charge of administering the Interstate Land Sales Act, 15 U.S.C. §1701 et seq., must, prior to approval and registration of a Statement of Record and Property Report under the Interstate Land Sales Act, conduct an environmental impact study in compliance with the National Environmental Policy Act, 42 U.S.C. §4331 et seq., and the guidelines of the Council on Environmental Quality and the Department's own guidelines promulgated under the National Environmental Policy Act requirements.

2. Plaintiffs further seek injunctive relief requiring H.U.D. to withdraw approval of Interstate Land Sales filings pending the Environmental Review Process as same pertains to the Property Report and Statement of Record filed by Flint Ridge Development Co. effective May 2, 1974.

Flint Ridge Development Co. joined these proceedings as an intervening defendant on the morning this case was brought to trial, first requesting to appear as *Amicus Curiae*, which request was denied. Then Flint Ridge Development Co. was permitted to intervene as a party defendant with the understanding that it could withdraw at the end of the trial if it chose to do so. The Court finds now that Flint Ridge Development Company may withdraw if it chooses to do so, but to the knowledge of the Court it has not filed any written request to withdraw from these proceedings so the Court finds that Flint Ridge may or may not remain in the case as it sees fit.

This action is primarily and in all things an action against the defendants James T. Lynn, Secretary of Housing and Urban Development, and George K. Bernstein, Administrator of Interstate Land Sales, Department of Housing and Urban Development, and the United States of America, ex rel the Environmental Protection Agency, for the sole purpose of requiring these governmental agencies to comply with the Acts of Congress relating to environmental protection. This action has two principal issues for the Court to determine:

1. Whether H.U.D.'s action in approving the Property Report and Statement of Record for Flint Ridge Development Co., under the Interstate Land Sales Act, constituted major federal action; and

2. Whether the development itself, together with any peripheral developments associated therewith, would significantly affect the quality of the human environment, of which the Illinois River, its basin and tributaries, is a part.

The Court heard many learned expert witnesses who testified generally and specifically as to the actual potential result of the Flint Ridge Development Co.'s project in the counties of Delaware and Adair, Oklahoma. The Court heard testimony of the Flint Ridge Development Co., the federal defendant, H.U.D. and the Oklahoma State Departments of Health and Water Resources.

The Court, having carefully examined the files, the briefs, pleadings, testimony, exhibits and the issues involved in this case, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Illinois River and its basin which is situated in eastern Oklahoma beginning at the western boundary of Arkansas and continuing westerly to Lake Tenkiller near Muskogee, Oklahoma, is within the boundaries of the Eastern District of Oklahoma.

2. The plaintiffs are both residents of the State of Oklahoma and are actively engaged in the preservation of the Illinois River basin and other similar areas in Oklahoma.

3. "Flint Ridge" is a joint venture organized and promoted by Flint Ridge Development Company. The Court finds that Flint Ridge Development Co. has located its joint venture project on the Illinois River basin because of the beauty the river affords for such a development. The attractiveness of the Illinois River basin was and is the motivating factor in Flint Ridge Development Co. seeking out this specific location for promotional purposes.

4. Flint Ridge Development Co. has filed its Statement of Record and Property Report and has divided the property for the purpose of selling to prospective home builders throughout the United States and has done so by use of the United States mails.

5. Flint Ridge Development Co. proposes to sell 3,000 lots ranging in price from $6,500 to $25,000 per vacant lot. If each lot sold for $6,500, the gross revenue to the development would be $19,500,000; that if all 3,000 lots were sold at $25,000 each, the gross sales would be $75,000,000; that if the gross amounts were added together and divided by two, Flint Ridge Development Co. would have a gross income of $47,250,000. These figures reflect the magnitude of the

development and show that H.U.D.'s action in approving the Property Report and Statement of Record under the Interstate Land Sales Act constituted major federal action.

6. Flint Ridge Development Co. is a joint venture composed of Frates Development Company, Tulsa, and Flint Ridge Development Co., Inc. of Tulsa, Oklahoma. Frates Development Company is a subsidiary of Frates Properties, Inc., of Tulsa, Oklahoma, and Flint Ridge Development Co., is a wholly owned subsidiary of Context Industries, Inc., of Miami, Florida. This joint venture owns the development known as "Flint Ridge" and does business in the Eastern District of Oklahoma.

7. The Department of Housing and Urban Development is a federal instrumentality which, through its sub-agency, the Office of Interstate Land Sales, has statutory and administrative responsibilities for enforcement and administration of the Interstate Land Sales Act.

8. The plaintiff organizations are comprised of individuals and affiliated conservation outdoor organizations. Plaintiffs have filed with the Clerk of this Court a list of several thousands of signatures of individuals living in and around the eastern part of Oklahoma stating and claiming frequent and consistent use of the Illinois River for purposes of hiking, camping scouting, canoeing, fishing, swimming and general outdoor recreational purposes.

9. The United States Constitution provides that Congress shall regulate Interstate Commerce and Congress saw fit to create the statutory authority for H.U.D. to administer the Interstate Land Sales Act and also to establish the Environmental Protection Agency for the sole purpose of protecting environmental areas for the use of the citizens of this country.

10. The Illinois River is a state-designated "scenic river" and the river as a matter of fact possesses substantial esthetic qualities, which qualities in fact caused Flint Ridge Development Co. to undertake its development in this area.

11. The evidence is clear that the present and proposed development by Flint Ridge Development Co. comprises approximately 7,000 acres, with an ultimate proposal of acquiring an additional 14,000 acres.

12. The Court finds that each lot sold and home built will contain a septic tank for all human refuse. Upon completion of the project 3,000 septic tanks will dispose refuse into the Illinois River. The soil in this particular area is made up primarily of limestone gravel, chert rock or gravel and clay, and that the soil is very porous and the seepage from the 3,000 septic tanks will soon find its way into the clear waters of the Illinois River and cause pollution damage thereof and destroy forever the environmental quality of the Illinois River Basin.

13. It is important to remember that plaintiffs made demand upon H.U.D. to prepare an environmental impact statement prior to approval of the Statement of Record and Property Report. This H.U.D. refused to do. The Court finds that H.U.D.'s refusal to prepare the environmental impact statement and to perform its duty under the guidelines of the National Environmental Policy Act, the Council of Environmental Quality or its regulations was serious dereliction of its duty imposed upon it by Congress.

14. Flint Ridge Development, together with its peripheral developments has actual or potential substantial effect upon the depth and course of the Illinois River, its tributaries and drainage area, to the plant life,

the wildlife habitats, the fish and wildlife, soils, air, esthetics of the area and upon the socio-economic conditions in the area including such matters as health and hospital care and facilities, roads and highways, schools, police and fire protection.

15. Flint Ridge Development Co. is an organization which directly or indirectly sells or leases, or offers to sell or lease, or advertise for sale or lease, lots in a subdivision, containing more than 50 lots, pursuant to a common sales scheme and in Interstate Commerce.

16. Under the Interstate Land Sales Act the Office of Interstate Land Sales, a sub-agency of the Department of Housing and Urban Development, has the authority and duty to issue rules and regulations providing for an exemption from the provisions of the Act, the authority to review filings under the Act, and to note deficiencies therein (thereby suspending the effectiveness of the filing until such time additional information as the Secretary shall require is provided and the deficiencies corrected), the authority to conduct hearings and make findings and conclusions with respect thereto in connection with filings under the Act, the authority to suspend the effectiveness of the Statement of Record and Property Report under amendments filed subsequent to the effective date of the Act of the filings, the authority to suspend the Statement of Record upon a finding of any untrue statement of a material fact or omission to state any material fact required to be stated or necessary to make the statements not misleading, and the authority to conduct investigations and initiate criminal prosecutions for violation of the provisions of the Interstate Land Sales Act.

That upon the initial filing of the Statement of Record and Property Report by Flint Ridge Development Co., the Office of Interstate Land Sales did in fact find deficiencies and did in fact suspend the effectiveness of the Statement of Record in excess of 30 days from the filing date and according to the testimony of an official representative of the Office of Interstate Land Sales that Flint Ridge Development Co. was prohibited from selling lots during the period of this suspension.

17. That whenever a Federal agency makes a decision which permits action by other parties, public or private, which will affect the quality of the human environment, such decision constitutes major federal action, which is what occurred in this case. *Scientists' Institute for Public Information, Inc. v. A.E.C.*, 481 F.2d 1079 (C.A. D.C. Cir., 1973).

18. That there is an overriding public interest in preservation of the character of the area described generally as the Illinois River Basin and that the public interest in preserving the character of that ecosystem is one that the plaintiffs may seek to protect by obtaining equitable relief. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (C.A. 10, 1973).

19. That the Department of Housing and Urban Development by its sub-agency, the Office of Interstate Land Sales, has not brought its policies and procedures into compliance with requirements of the National Environmental Policy Act, Title 42 U.S.C. Sec. 4333, in that they have no rules, regulations or guidelines promulgated so as to enable them to comply with the National Environmental Policy Act's purposes and intendments.

20. That the defendant, H.U.D., and the Office of Interstate Land Sales, in administering and enforcing the Interstate Land Sales Act and making decisions associated with such administration and enforcement, have not, in whole or in part, complied with any of the mandatory requirements contained in 42 U.S.C. Sec. 4332.

Conclusions of Law

1. The Court has jurisdiction and venue (28 U.S.C. §1391(e)) over the instant case and the plaintiffs have standing to bring this action.

2. The National Environmental Policy Act applies to all Federal agencies and their subdivisions and requires that all Federal agencies "to the fullest extent possible" must strictly comply with the requirements of the National Environmental Policy Act. The Court further finds as a matter of law that every Federal agency, at the lowest possible level, is required to consider the effects of each decision made by that agency upon the environment and to use all practicable means to avoid environmental degradation. *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F.2d 1109 (C.A.D.C., 1971) cert. denied, 494 U.S. 942 (1972); *Davis v. Morton*, 469 F.2d 593 (C.A. 10, 1972); *Ely v. Velde*, 451 F.2d 1130 (C.A. 4, 1971); See, *National Helium Corporation v. Morton*, 455 F.2d 650 (C.A. 10, 1971).

3. There is nothing contained within the Interstate Land Sales Act which specifically excludes N.E.P.A. application. See, *Davis v. Morton, supra.*

4. H.U.D. contends there is no major federal action involved. The concept of major federal action has

evolved from the concept of Federal planning, participation in, funding or benefit from a project, See *Natural Resources, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C., 1972), to include those federal actions taken as a result of an agency decision which permits an action by other parties which will affect the quality of the human environment. *Scientists' Institute for Public Information, Inc. v. A.E.C.*, 481 F.2d 1079 (C.A.D.C. Cir. 1973). Nowhere is the evolution of the concept of major federal action more complete than in the Tenth Circuit. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (C.A. 10, 1973); *Davis v. Morton, supra; National Helium Corporation v. Morton, supra.* These cases hold and reflect that N.E.P.A. is intended to interrupt business-as-usual and to affect the decision-making process at the lowest agency level. N.E.P.A., with its unequivocal command to implement its policy, "to the fullest extent possible" does not render the procedural requirements discretionary. *Calvert Cliffs' Coordinating Committee v. A.E.C., supra; Ely v. Velde*, 451 F.2d 1130 (C.A. 4, 1971).

The decision of the Interstate Land Sales Office to either approve or suspend or to ascertain that deficiencies exist, or have been corrected, in the Statement of Record or Property Report, is major federal action. The case of *Davis v. Morton, supra*, together with the cases cited therein, hold that major federal action exists when the only action was approval by the Government of a project, licensing, permitting a project or enterprise or abandoning a railroad line. In the *Davis* case the sole federal action involved was an approval, under a delegation of powers, or a lease of Indian lands by a local Department of Interior official.

5. Where a federal license or permit is involved, or where Congress possesses and has utilized its plenary power of regulation under the Interstate Commerce Clause, or other Constitutional authority, federal approval constitutes major federal action. The approval of a filing under the Interstate Land Sales Act is in the nature of a federal license or permit, for without the approval it is unlawful to engage in sales and Congress has exercised its plenary power under the Interstate Commerce Clause by enacting the Interstate Land Sales Act.

6. The National Environmental Policy Act compels Federal agencies to review and reappraise existing policies and procedures in light of developing law and in light of developing agency awareness of environmental factors, 42 U.S.C. §4332. "The Sweep of N.E.P.A. is extraordinarily broad, compelling consideration of any and all types of environmental impact on federal action," *Calvert Cliffs' Coordinating Committee v. A.E.C., supra.*

7. Plaintiffs must establish an overriding public interest in the preservation of the character of the area under concern and that there is a threat of environmental injury without compliance of N.E.P.A.'s procedures. *Wyoming Outdoor Coordinating Council v. Butz, supra; Calvert Cliffs' Coordinating Committee v. A.E.C., supra*. The Court concludes as a matter of law that the plaintiffs have met this burden.

8. One of the burdens of plaintiffs is to demonstrate either actual or potential or threatened results that will significantly affect the quality of the human environment. *Wyoming Outdoor Coordinating Council v. Butz, supra.* The Court further concludes that it is one of the purposes of the National Environmental Policy Act to

determine with more exactitude what the actual or potential environmental impacts would be and to take steps to minimize or prevent both long-range and short-range impacts. The Court finds as a matter of law that the plaintiffs have met this burden.

9. As a general rule these impacts include, but are not limited to, effects upon the depth or course of stream, plant life, wildlife habitats, fish and wildlife, soil, the air, the quality of water, social and economic impacts, and effects upon esthetics and recreational opportunities. *Natural Resources, Inc. v. Grant, supra.* The Court notes from its findings of fact and conclusions of law that the plaintiffs have demonstrated actual and potential environmental effects in all of these areas, and therefore, that the decision to approve the Statement of Record and Property Report by H.U.D. of Flint Ridge Development Co. is a major federal action which "significantly affects the quality of the human environment."

10. The Court further concludes, as a matter of law, that any attorney fees and costs to be assessed against the defendant, United States of America, or the Flint Ridge Development Co. shall be heard and considered upon proper application after the action of this Court has become final or after a final Order of any appellate court.

An appropriate Order and Judgment will be entered accordingly herein.

Dated this 4th day of September, 1974.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, Plaintiffs, vs. JAMES T. LYNN, Secretary of Housing and Urban Development and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, Defendants, and FLINT RIDGE DEVELOPMENT CO., a joint venture, Intervening Defendant, and THE UNITED STATES OF AMERICA, ex rel The Environmental Protection Agency, Additional Defendant.	)	No. 74-131-C Filed: Sept. 4, 1974

ORDER, JUDGMENT AND DECREE

Based upon the Findings of Fact and Conclusions of Law this day filed, IT IS THE ORDER, JUDGMENT AND DECREE OF THIS COURT that:

1. The Department of Housing and Urban Development and the Office of Interstate Land Sales be, and they are hereby enjoined and restrained from approving the Interstate Land Sales filing of Flint Ridge

Development Co. until such time as the environmental impact study has been prepared and a public hearing held thereon, and further the Department of Housing and Urban Development and the Office of Interstate Land Sales of that Department are hereby ordered to immediately withdraw the approval of the Flint Ridge Development Co. filing which was effective May 2, 1974, and not to reinstate said approval until the further Order of this Court.

2. Plaintiff will post bond in the amount of $100.00.

3. The Department of Housing and Urban Development of the United States Government shall conduct a full, thorough and complete environmental impact study of the effects of the Flint Ridge development on the quality of the human environment and that they specifically and in detail address themselves to the following:

(a) The environmental impact of the proposed actions;
(b) Any adverse environmental effects which cannot be avoided should the proposal be implemented;
(c) Alternatives to the proposed action, including no action;
(d) The relationship between the local short-term uses of man's environment and the maintenance and the enhancement of long-term productivity;
(e) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Department of Housing and Urban Development is further ordered to consult with, and obtain the comments of, any and all other federal agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved.

4. Upon completion of the impact study, a copy thereof shall be filed with this Court.

5. The environmental impact statement shall be made available to the President of the United States, the Council on Environmental Quality and to the public as provided by Title 5 U.S.C. §552 and Title 42 U.S.C. §4332(C).

6. The injunction and restraining order set out in paragraph 1 hereof shall be administered by James T. Lynn, Secretary of Housing and Urban Development and his successor and by George K. Bernstein, Administrator of Interstate Land Sales, Department of Housing and Urban Development and his successor. That a certified copy of this Order shall be served by registered mail upon James T. Lynn and George K. Bernstein at HUD Building, 451 Seventh Street S.W., Washington, D.C. 20410.

7. It is specifically Ordered that the property report and statement of record filed by Flint Ridge Development Company, a joint venture, be, and the same are hereby suspended, vacated and held for naught, and no further public sales shall be conducted thereunder unless and until further Order of the Court.

A certified copy of this Order shall be delivered by registered mail to Flint Ridge Development Company c/o F. Paul Thieman, Jr., Attorney, 5800 East Skelly Drive, Tulsa, Oklahoma 74135.

Dated this 4th day of September, 1974.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATUTES INVOLVED

Interstate Land Sales Full Disclosure Act, United States Code, Title 15

§1706.

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the

amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

* * *

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

§1716.

The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

National Environmental Policy Act of 1969, United States Code, Title 42

§4332.

The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall–

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized

to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

§4333.

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§4334.

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§4335.

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

Supreme Court, U. S.
FILED
JAN 29 1976
JR., CLERK

JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-510 &
75-545

FLINT RIDGE DEVELOPMENT COMPANY,
Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
Petitioners,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI IN NO. 75-510 FILED OCTOBER 2, 1975

PETITION FOR A WRIT OF CERTIORARI IN NO. 75-545 FILED OCTOBER 8, 1975

CERTIORARI GRANTED DECEMBER 8, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-510 &
75-545

FLINT RIDGE DEVELOPMENT COMPANY,
Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
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v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Page
Docket Entries	1
Transcript of Proceedings held before the Honorable Luther Bohanon in the United States District Court for the Eastern District of Oklahoma on July 31, 1974 and August 1 and 2, 1974	
Testimony of Bill Howard	
Direct Examination [27]	3
Testimony of Jerry Overton	
Direct Examination [40]	6
Cross Examination [87]	12
Testimony of Edward Jackson Pugh	
Direct Examination [92]	13
Testimony of Paul Buck	
Direct Examination [141]	17
Testimony of Austin Kent Andrews	
Direct Examination [161]	26
Testimony of Bill Cox	
Direct Examination [170]	29
Testimony of Jerry Cleveland	
Direct Examination [176]	31
Testimony of Thomas D. Peace	
Direct Examination [190]	33
Testimony of Thomas Aley	
Direct Examination [233]	35
Cross Examination [260]	43
Testimony of John Montgomery	
Direct Examination [275]	49
Testimony of Monty Murphy	
Direct Examination [299]	52
Testimony of Marvin W. Baker, Jr.	
Direct Examination [316]	54

	Page
Transcript of Proceedings held before the Honorable Luther Bohanon in the United States District Court for the Eastern District of Oklahoma on July 31, 1974 and August 1 and 2, 1974 – Continued.	
Testimony of Kirk Breed	
Direct Examination [338]	60
Testimony of Bob Nichols	
Direct Examination [361]	62
Testimony of David R. Strickland	
Direct Examination [379]	64
Testimony of R. LeRoy Carpenter	
Direct Examination [428]	64
Cross Examination [442]	66
Testimony of John H. Armstrong	
Direct Examination [448]	67
Testimony of Dorwin Lee Hagard	
Direct Examination [468]	72
Testimony of William N. Holway	
Direct Examination [475]	75
Cross Examination [501]	84
*Opinion of the United States Court of Appeals for the Tenth Circuit, filed July 30, 1975	Pet. App. 1a
*Judgment of the United States Court of Appeals for the Tenth Circuit, filed July 30, 1975	Pet. App. 15a
*Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of Oklahoma, filed September 4, 1974	Pet. App. 1b

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*Not reprinted in Appendix. Citations are to appendix of Petition for Writ of Certiorari filed by Petitioner Flint Ridge Development Company. The respective pages for these items in the Petition of the Solicitor General are 1a, 16a, 18a, and 31a.

Page

*Order, Judgment and Decree of the United States District Court for the Eastern District of Oklahoma, filed September 4, 1974 ..... Pet. App. 13b

Orders of the Supreme Court dated December 8, 1975, granting the petitions for writs of certiorari and consolidating the cases 86

*Not reprinted in Appendix. Citations are to appendix of Petition for Writ of Certiorari filed by Petitioner Flint Ridge Development Company. The respective pages for these items in the Petition of the Solicitor General are 1a, 16a, 18a, and 31a.

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 74-131 (Civil)

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, Corporations,

Plaintiffs,

v.

JAMES T. LYNN, Secretary of Housing and Urban Development and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development,

Defendants,

and

FLINT RIDGE DEVELOPMENT CO.,
a joint venture,

Intervening Defendant,

and

THE UNITED STATES OF AMERICA, ex rel
The Environmental Protection Agency,

Additional Defendant.

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS
4/24/74	Verified Complaint
5/15/74	Amended Complaint

DATE	FILINGS – PROCEEDINGS
7/31/74	Hearing on Temporary Restraining Order
8/1/74	Further Hearing
8/2/74	Further Hearing
8/14/74	Second Amended Complaint
9/4/74	Findings of Fact and Conclusions of Law
9/4/74	Order, Judgment and Decree
9/6/74	Notice of Appeal

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Title omitted in printing]

Transcript of Proceedings Held Before the Honorable Luther Bohanon on July 31, 1974, and August 1 and 2, 1974

* * *

[27] Q Will you state your name, address and occupation, sir?

A My name is Bill Howard. My address is 5026 West Tecumseh Road, Norman, Oklahoma, and I am the Executive Director for the Oklahoma Wildlife Federation.

Q Mr. Howard, would you give the Court, sir, a resume of your educational background and any degrees that you hold?

A Yes. I am a graduate with a BA from Washburn University in Topeka, Kansas, and I have completed studies except for the [28] final defense of my Master's thesis at Kansas State University; got an MS degree in environmental biology.

* * *

Q If you could tell the Court, please, generally now, what is the science of ecology?

A Well, I guess a thumbnail definition would be that it is the study of all living things and their relationship to the living and non-living environment around them.

Q And what is an ecosystem?

A Okay. This would be defined as communities of living things in a given area and also the non-living things in a given area. This for example would include the nutrients in the soil, nitrogen, phosphorous and so on, climatic conditions, [29] as well as the living components of the system.

Q Would it be proper to characterize an ecosystem as the sum of all the living and non-living parts that support the chain of life within a selected area?

A Yes.

* * *

Q (By Mr. Dalton) Now in this chain that we referred to, are there certain links, or how would you describe the links of that chain, if you can?

A Well, within an ecosystem there are several structural components that are of interest to the person who is studying or looking at an ecosystem.

The most basic one is what is generally referred to as producer organisms. These are generally green plants in the case of terrestrial ecosystems, through the process of photosynthesis to convert the energy of the sun and basic chemical elements and water into glucose and eventually other chemical compounds that are usable by grazing animals, for example, insects, grasshoppers, deer, cattle, and so on.

[30] A step above that, if you want to think in terms of a ladder of progression, would be a level of what is generally referred to as primary consumers. These are living organisms such as the Type I just mentioned, grasshoppers, rabbits, rodents, birds who eat seeds or fruit; in other words, living organisms that feed directly upon the producing plants in a community.

Above that would be another level called ordinarily secondary consumers, and these would be predator type creatures. The Bob White quail would eat the grasshopper, for example, and in that particular sequence of events would be a secondary consumer. At another time of year he would be a primary consumer because he is eating the seeds of the plants rather than insects.

And then there is another level above that referred to commonly as tertiary consumers, and these are generally what we consider to be the large predators, hawks, owls, animals that are generally totally predatory in nature.

Then there is another whole category within an ecosystem of living organisms and these are the decomposers. These would be the organisms such as different species of fungus, bacteria, some insects that decompose dead organic material, dead animals, leaves, fallen branches, fallen trees and this sort of thing.

* * *

[31] Q Can you tell us what would be meant by this chain being in equilibrium, or biological equilibrium or biotic balance?

A Well, part of the definition of an ecosystem is the units [32] wherein all of the living parts of the system interact, where you have exchanges of energy and nutrients, the flow of energy, the cycling of nutrients; and as time progresses, an ecosystem will go through various stages until it eventually reaches what is commonly referred to as a climax stage unless it is set back by some quote catastrophe, such as man's activities, a fire or whatever.

Well, when it reaches its climax stage, there exists a situation that is generally referred to as natural equilibrium, and this is a situation where there is a relatively stable flow of energy through the system, a relatively stable cycling of a certain amount of nutrients.

It is a very diverse community supporting many different kinds of plants and animals. There will be dominant species but the main characteristic of it is that it is diversified, and therefore it is relatively stable. I guess what that means is that it is impervious, or relatively impervious to any disruptions that can occur to it.

Now of course man can come in with a bulldozer or whatever and disrupt it severely, but in the natural order of things it is stable.

* * *

[40] JERRY OVERTON,

called as a witness on behalf of the plaintiffs, being of lawful age and having first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Dalton:

Q Would you state your name, address and occupation, please, sir?

A Jerry Overton, 401 Wadsack, Apartment B, Norman, Oklahoma.

Q What is your occupation?

A I am an instructor of geography at Cameron University, presently on leave of absence at the University of Oklahoma for extended graduate work.

* * *

Q (By Mr. Dalton) Speak up a little bit, Jerry, please.

Would you give the Court, please, a resume of your educational background, including degrees that you hold or are presently working on?

A Yes, sir. Bachelor of Science degree, Oklahoma State University in Geography.

* * *

[41] A (The Witness, continuing) Bachelor of Science degree, Oklahoma State University, Physical Geography; Master of Science degree, Oklahoma State University, Physical Geography; presently working on a Ph.D., University of Oklahoma, in Physical Geography.

Q (By Mr. Dalton) Are you employed at this time?

A Yes, sir.

Q What are you doing at this time?

A Okay. I am employed at Cameron University but I am on leave of absence, at the present time I am actually just doing graduate work, actually employed, too.

Q May I ask you this, are you generally and specifically familiar with the Illinois River in Oklahoma, the Flint Ridge development along that river, and the river system itself?

A Yes, sir.

Q Have you done any studies pertaining [sic] the development on that river?

A Yes, I have.

Q What is the title of that study?

A The title is "Mid-Illinois River, Mid-Illinois Resources Assessment and Partial Statement."

Q What was the scope of that study?

[42] A There was actually two scopes. One was to assess the resources of the Illinois River Basin itself.

Q Assess them?

A Assess them, yes, sir. To see what's there; and secondly, to look into developments and compare the resources with the developments and see if there is any possible impacts.

Q And were you assisted on that study by anyone?

A Yes, I was.

Q Who was that?

A Mr. Ed Pugh.

* * *

[43] Q (By Mr. Dalton) Now will you state generally what you did in the performance of this study and assessment of the river resource, state generally what you did.

A Okay. We took all information that we could find, all reports and so forth of government agencies or private individuals, dissertations, theses, if we could find these, and synthesized them and produced a concise resource assessment of the river basin area, for a portion of the river basin area.

MR. THIEMAN: I am sorry, I can't hear.

A (The Witness, continuing) We took the various statements, reports, that we could find dealing with the mid-Illinois River Basin, and synthesized these and produced this one concise assessment of resources.

We visited the area. We talked with the people at Flint Ridge, obtained all the information we could find about the [44] Flint Ridge area, and compared these as well as other developments, I might add, along the area as well as non-developments, areas just owned, being utilized as wood land, farm land or whatever, and compared these use resources and produced a partial statement.

Q (By Mr. Dalton) As a result of your study, did you make any conclusion?

A Yes, sir, we did.

Q All right, now what conclusions did you draw as a result of this study?

A We drew several conclusions. Our primary conclusion was that not enough is really known of the area, as far as resource is concerned, that has been written in statements or whatever, to in our opinion allow development to take place.

Our conclusion then would be that an impact statement should be done, an environmental impact should be done of the area to compare the resources with any type development that might take place.

* * *

[45] A As I mentioned, our primary focus first was on the resource assessment of the area. This was our first procedure of the study.

We took each of the various main categories of resources, studied them individually. We studied first soils of the area. We found that there are actually four soil associations in the immediate environment of the Illinois River Basin; that of these four soil associations there are only two that predominate. The other two are found in only small areas,

* * *

[53] The Clarksville soils and the Boone chert formation, the upper formations, is highly susceptible to pollution.

Q I beg your pardon?

A It is highly susceptible to pollution.

Q In what form?

A Of any form, any liquid pollution in the area. It's, as I mentioned, unconsolidated, it's very shallow in places. That is, there is an impermeable layer or a layer

that would act as an impermeable layer to downflow of water, that is in some cases very shallow.

* * *

[54] Okay. The third type of resources we looked at in the [55] area was the flora, in other words, the vegetation of the area.

The vegetation is primarily oak, hickory, pine association. We found most of our material in waterfalls –

THE REPORTER: In what?

THE WITNESS: Waterfalls.

A (The Witness, continuing) And throughout this work the list of flora of the Ozark Plateau.

I mention this primarily because there is no incisive valuation of the flora resources for the northeastern part of Oklahoma and surely not for the Illinois River Basin itself.

Q (By Mr. Dalton) Let me ask you this, why should there be, is there a reason to do such a study or such a resource?

A Any time any development takes place in an area, an idea of what resources are there should be known. This is because throughout history various developments have taken place that have destroyed certain types of resources, whether it be flora, fauna, water or soil, whatever.

So a resource assessment should be done in any area that is under concentrated development.

* * *

[58] Now two aspects we believe of this development which will carry over into any other development in the area are worth mentioning. One is the septic tanks situation. There are going to be approximately three

thousand homesites in the Flint Ridge Development area.

Each of these homesites will be required to construct and use an individual septic tank for their own sewage effluent distribution. There is no provision for a connected sewage system and ultimately a sewage disposal plant in the vicinity or in connection with the Flint Ridge Development.

Now the impact, possible impact or probable impact, I'm sorry, of the septic tank situation is that the effluence from the septic tanks will flow into this Boone chert formation that I have discussed already.

Anything flowing from this tank would flow directly into the upper water tables, the upper aquifers of the Boone chert formation, which will be the Boone aquifer.

It is very shallow, as I have mentioned quite often. It will flow to the base level and be a part then of the water, ground water system in this area.

In many cases the Boone chert formation actually is a perched water table.

* * *

[59] The other problem we saw with the Flint Ridge area is the steepness of the slopes.

I'd like to have the slide.

The steepness of the slopes. Some slopes are very steep.

* * *

[60] Now it is engineeringly possible, I believe, to build stilt type houses which will be the type built here. This is also environmentally a hazard to build such houses. Any time that you denude in any way the vegetation on these slopes, they are very susceptible to

erosion. They will possibly form gullies, sheet erosion that will strip the entire area of any soil that is there.

* * *

[62] Now I think it's quite obvious that there are very steep slopes here on that side of the river.

Now the question that we really raised with our study is what impacts, what long range impacts will result from the various types of development within these types of resources.

The soil, the water, the flora, the fauna – what will be the long range impact of these?

What we have exhibited here as the impact is very, very minor. It's just beginning. No great impacts have occurred yet in the area.

* * *

[70] A (The Witness, continuing) The shot was taken from the road. This is a bar ditch alongside of the road, going down to one of the lakes in the Flint Ridge area that is now under construction.

You can see on this again the unconsolidated material, also the steepness of the slopes, where the vegetation is presently being found.

I might add that I was in the area during the rains, and on these sides where the vegetation is, water was actually squirting out of the slopes, where it would run down into the soil to an impervious layer and because of the heavy rainfall it was actually squirting out like a faucet.

* * *

[87] Q Now then, in septic tanks, have you made studies to determine how far the effluent from a septic tank follows through the soil before the effluent is purified?

A I have not made a study. I understand it varies from one [88] soil to another.

Q Well, have you made a determination with respect to the type of soil that is in Delaware County?

A No, sir, I have not.

Q You have not?

A No, sir.

Q Do you know it to be a fact that the State Health Department did, and it was based upon that recommendation that they approved the septic tanks?

A No, sir, I didn't.

Q Don't you deem that would be a relevant part of a study, that even preliminary as you made, that you should have determined yourself?

A We should have had that in our statement, yes, sir.

MR. THIEMAN: I believe that's all.

* * *

[92] Most of my socio-economic study was based on county situation profiles for each county, April, 1974.

Q Each county; which ones?

A That's Cherokee, Adair and Delaware Counties.

Q All right.

A And this was a publication of the Office of Community Affairs and Planning of the state, and that's all.

* * *

[93] We can quibble about semantics or whatever, but the human resource is very important no matter where we are; and in these counties we have a situation of extreme poverty. In one case, Adair County, forty percent of the families are below the poverty level.

Q What is the poverty level?
A Around $3,700.
Q Who establishes that?

* * *

[97] A (The Witness, continuing) All right. What I want to show here is that there is very little development, and our state has substate planning districts and departments which are responsible to the people of Oklahoma and to the people of their district, in planning and coordinating the development in their district, whatever it might be.

The small black dots are very small communities which consist of only a few homes, gasoline stations, something like that.

The red dots along the river in Oklahoma are public and [98] private access, or public or private campsites. Some are commercial sites. And just take a good look and we only have this one major area, ten thousand people approximately.

This is what we are going to do with it. This is what is intended to be done to it. The red is the Flint Ridge development.

* * *

As we can see, this one area in this development, in area, is greater than all other development in the entire basin.

If that in itself does not require some planning, some comprehensive plan with the state or whatever, I don't know what does.

* * *

[100] If people are going to be responsible, if officials are going to be responsible to the people they

represent in coordinating planning for these counties, as I say, the socio-economics are very poor for these areas.

* * *

[102] Q (By Mr. Dalton) What do you conceive to be the potential impact on socio-economic problems?

* * *

A Well, the conclusions are that we have this tremendous development and how it will be developed, who the people are

* * *

[103] A (The Witness, continuing) Okay. My conclusions outlined were: as to education, negative. One, possible increased strain on present primary and educational facilities; two, possible need for increased number of educational facilities; three, possible strain on school bus services.

Population: an over-population for the present resource space. As we can see, as it is now, Tahlequah is the largest community. If we have 3000 homes in the Flint Ridge Development with only three people per home, that will equal almost the present largest development, Tahlequah.

* * *

[104] Let me follow up. It is also possible in this type of development, possible unbalanced age distribution in the case of retirement homes for people, second homes, things like that.

Health and welfare, possible increased strain on already inadequate health and walfare [sic] facilities, as shown by these county situation profiles. Possible lower level of water quality for domestic supply, which is of a very high level in comparison with other rivers in Oklahoma.

* * *

[106] The largest town which could provide, the largest town within a few miles of the Flint Ridge Development which could provide fire and police protection and solid waste disposal is called Kansas, Oklahoma. I'm not even sure what the population is, but I would say it's around a hundred or less, very small.

[107] Government. With something like this, this would be definitely without planning. Increased burden on general administration efficiency. Increased burden on present police and fire protection. Increased taxes to meet the increased needs. That's most definite.

Possible strain on present transportation facilities.

And recreation, possible loss of potential access to the Illinois River.

Increased strain on present riverside recreational facilities. With an added 9000 people in residence or whatever it may be, that is definitely a strain on what is there because it's hard even to get a canoe now.

Decreased quality of physical environment as well as its esthetic value, a very important thing which is always thrown under the rug; but what is esthetic value, how can we get at it? Can we quantify esthetic value? I kind of doubt it because it's something that means something very special to each and every one of us, depending on what we are viewing at that particular time.

Possible loss of certain specie of fish and mammals. This would be a loss to hunters, fishermen and naturalists, and I think the American populace.

General increased hazard to the recreationist. Indeed if we have an increase in population of 9,000 in only a few years, I believe the mortgage on the Flint Ridge Development [108] is up in around 1980 or '81, something of that nature.

Possible environmental deterioration, a result in a long run decrease in tourism which is basic industry for this area.

Also, positive factor, there are positive factors. I recognize these. I am not trying to be biased.

An increased tax base. Definitely if the type of income that will be necessary to purchase these lots and to build adequate constructions on them most definitely would require a certain property tax which would increase the tax base for that area, which may increase, which may meet the needs of all these other adverse effects I talked about, but not all of them.

Possible increased employment opportunities for unskilled and skilled laborers in the construction industry, which would only be a short term benefit; and increased financial resource base due to increased sales and services, and to an increase in population which needs and demands certain goods and services.

So an overview here of positive and negative factors associated with increased residential development in the Illinois River Basin of these three counties, it can readily be seen that numerous problems are involved.

If any one person here doesn't see at least one problem involved here – well, between thirty percent and forty percent, as I said, are below the poverty level in this area.

What these people of these counties and of Oklahoma with

* * *

[141] A My name is Paul Buck. I live at 1623 North Delaware Place in Tulsa. I teach at the University of Tulsa.

* * *

[142] Q What is your major field?

A I am trained as a botanist although I teach biology.

Q And what department at the University of Tulsa are you a part of?

A In the Department of Life Sciences.

* * *

Q Would you tell the Court briefly your educational background and the degrees that you hold?

A I took my Bachelor of Science from the University of Tulsa; my Master of Science from the University of Tulsa; and [143] received my Ph.D. from the University of Oklahoma.

Q When did you receive the Ph.D.?

A 1962.

Q Are you the author of any publications, academic publications, dealing with ecology or the life sciences?

A Yes. I have published in the Oklahoma Academy of Science.

Q Would you tell the Court the names of those publications and your articles?

A One involved the ecological succession in subalpine ponds in the Rocky Mountains; another one in Proceedings of the Oklahoma Academy of Science involved plant lifts in southwestern Oklahoma.

One in the Southwestern Journal involved a study of the prairies in northeastern Oklahoma; one, in the Journal of Ecology involved a study of woodlands, forests, in southwestern Oklahoma.

Q Have you ever participated in any environmental studies?

A Yes, I have.

Q Would you tell the Court what they are?

A I co-authored an environmental impact study funded by the Corps of Engineers on Lake Tenkiller Reservoir.

* * *

[144] Q Do you belong to any professional societies, Dr. Buck?

A Yes. I belong to the Ecological Society of America, the Association for the Advancement of Science, Triple A S; the Oklahoma Academy of Science; Southwestern Naturalists, and others.

Q Are you familiar generally with the location of the Illinois River?

A Yes, I am. We take our classes over there frequently.

* * *

[145] Q Is the Illinois River in itself an ecosystem?

A Yes, it is.

Q Is it also a part of a larger ecosystem?

A Yes, the complex terrestrial ecosystem of northeastern Oklahoma, but the Illinois River –

Q Let me interrupt you. In talking about terrestrial ecosystem, I want you to explain to the Court what that is and break down the different kinds of ecosystems, like a simple ecosystem or a complex ecosystem.

A The terrestrial ecosystem is one involving land, plants and of course the animals that interact with the plants.

An aquatic ecosystem is one involving water, a marine ecosystem, salt water.

The aquatic ecosystem may be a lake, which is a standing body of water. It may be a slow moving stream, such as the Canadian, the Arkansas Rivers. It

may be a swift moving stream, such as the Illinois River.

Q What is a multi-specific ecosystem?

A A multi-specific ecosystem is a type that occurs in [146] nature in which there are many, many species involved.

The Illinois River, for example, since that's the ecosystem under discussion, has thousands of invertebrate forms, not individual species but different species. There are many, many different kinds.

There are thousands of microscopic forms there, hundreds of kinds of fish. There are many kinds of vascular plants.

Q What are vascular plants?

A A vascular plant is one that has a system for translocating fluids from one part of the plant to another.

Q Now are vascular systems like circulatory systems?

A Parallel, yes.

Q Thank you.

A A non-vascular plant is something like a moss or a liverwort.

In nature, ecosystems are multi-specific and with this multi-specificity there is a built in stability which means that we could go into a multi-specific ecosystem and selectively destroy some specie and probably not harm the ecosystem.

On the other hand, since there is a multi-specific ecosystem, there is a mono-specific one and that is the sort of thing that we, man, generate with our crop plants. We have a mono-specific ecosystem based on members of the grass family, corn, oats, wheat, rye, rice, sugar cane and so on.

Obviously in that kind of an ecosystem, a mono-specific [147] ecosystem, the destruction of one form would result in the collapse of that ecosystem.

Q What about the kind of ecosystem of which the Illinois River is a part?

A That's a, at this stage it is a multi-specific ecosystem and if we could successfully go in there and destroy one specie, diatom or alga, or invertebrate, we probably would not harm it.

Q What is a diatom?

A Diatoms are miscroscopic forms.

Q Would you spell that for the reporter, please?

A The diatom?

Q Please.

A D-i-a-t-o-m.

Q Now go ahead with your explanation.

A These are microscopic photosynthetic organisms that are capable of, I think as Mr. Howard outlined earlier, trapping sunlight and using that energy along with carbon dioxide and water to manufacture organic molecules.

These diatoms are extremely important, as Mr. Howard called them the producers, the base of the food web.

THE REPORTER: The what of the food web?

THE WITNESS: The base of the producers.

Q (By Mr. Khourie) What eats the diatom?

A Protozoans, small one-celled creatures, small intervertebrates [sic], [148] stone flies.

Q And what eats those?

A Carniverous intertebrates [sic], beetles, the larvae forms of many of our flying insects, small fish, small amphibians.

Q Are all these forms of life present in the Illinois River near the Flint Ridge Addition?

A Let me say I suspect they are. I have not studied –

Q Let me rephrase the question.

Are they present in the Illinois River as an ecosystem, a broad ecosystem?

A Yes.

Q Can you explain how a man-made development, not referring to any specific man-made development here, how a man-made development differs in order of magnitude from evolutionary changes in the ecological system?

A Mr. Howard outlined succession very briefly, indicating that there were changes toward a stable climax, which we could refer to as a multi-specific ecosystem. This is stable in a given period of time, perhaps geologic time, at least in terms of the climate.

Changes take place continuously. The Ozark uplift is breaking down. The Illinois River is cutting into the stone there. What is now a straight, rushing stream will eventually sometime in the future be a slow, meandering stream of a completely different nature. The life there, the plants and [149] the animals, can adjust to that sort of a change just as we adjust through the years.

I am not talking about us individually, but man has adjusted through the years to changes. That's evolution.

However, there is a degree in terms of how rapidly this can take place. You can't step in in any ecosystem and upset the thing and expect to turn around the next day and find the plants and animals adapted and changed to fit that, that disturbance.

Q Assuming a man-made development at approximately the place where Flint Ridge is located on that map, can you give us some views as an expert on how man-made changes would affect the plant life in the river and around the river; assume now about three thousand homes.

A All right. I see potential there for some problems. One of these problems, and it has been thrashed about here today, is the problem of over-feeding or over-fertilizing the river – effluent from septic tanks.

Should you over-fee [sic] or over-fertilize the river, there is a series of events that takes place. It has been demonstrated repeatedly experimentally and repeatedly in streams.

The whole process is called tutrophitation [sic].

THE REPORTER: Called what?

THE WITNESS: Tutrophitation, t-u-t-r-o-p-h-i-t-a-t-i-o-n.

[150] Q (By Mr. Khourie) And what is that process?

A Briefly, in this process, what happens is that the nutrient material there permits algae to, the population virtually explode. Algae, you remember, are green plants that trap sunlight, carbon dioxide and water, manufacturing food material and releasing oxygen.

At the same time they are using the oxygen, so that they are releasing more during the day than they are using.

If the population explodes beyond the critical point, at night when it is dark when they cannot carry on photosynthesis, they cannot release oxygen, they are going to use it so rapidly that they deplete the oxygen

content in the water to a point where the fish cannot get enough oxygen and they die.

The dead fish are attacked by bacteria, the thing gets out of hand as you can see very quickly.

Q What would be the ultimate result?

A The ultimate result is a lake similar to, or a body of water similar to Lake Erie at this point.

* * *

[151] Q What about the plant life along the stream and in it?

A The plant life along the Illinois?

Q Yes.

A We are going to get up on the bank.

Q Okay. We can go back down in the water.

A Upon the bank the problem there of course would be mechanical disturbance, by clearing out the areas and so on, which would of course lead to another problem, but it permits silting in, removing the plants from this silting in.

Actually a very important faction of the nutrient material, and I am talking here about organic material, food material, for a fresh water stream, comes from the land.

Much of this, leaves that fall in, twigs, squirrels that fall out of trees and so on, these things are important to a fresh water stream.

Q All right. Would a man-made development disturb that particular balance of nature?

A Yes, yes, it would, along the points where there is, of course, disruption along the river.

[152] Q Would there be both short range and long range effects?

A Yes. The short range effect, of course, assuming they cleared the land, is the possibility of course of

silting, as I suggested, and with silting in over a long enough period of time, you can completely disrupt the ecosystem.

First of all, the silt in the water intercepts the sun's rays. Green plants then can no longer carry out this process.

Q Prevents photosynthesis?

A Yes. The silt that's deposited on the bottom is going to fill in the nests the fish have built, the silt is going to cover the fish eggs. Reproduction for that time will fail.

That's why I suggest now it's going to be a longer period of time than just one event.

Many of these animals that live in a fresh water fast flowing streams have rather unique mechanism for gaseous exchange, trading carbon dioxide for oxygen the way we do in breathing.

Those mechanisms, the external gills, are covered and sealed off by silt in the water.

They can tolerate fast, fresh, clean water. They cannot tolerate silt.

* * *

[153] Do you have an opinion, based on your expertise as an ecologist, teacher of botany, life sciences, as to what effect a development of the magnitude of Flint Ridge would have upon the ecosystem of which the Illinois River is a part, the terrestrial ecosystem?

* * *

[154] THE WITNESS: Yes, your Honor. I believe that there is going to be as a result of any development of this nature a detrimental effect upon the river. This could be a short range effect, as I have

suggested here just a moment ago in terms of silting in and so on.

One of the things that concerns me is the long range effect in terms of the pressure that is going to be exerted upon the river, the recreational pressure.

The river is subjected currently to pretty severe pressure in terms of the canoe trips and so on, the large masses of people that go over there each weekend and float the river.

I am deeply concerned that transporting a large segment of the population to the river is going to tip the balance, it's going to overload it.

Our ecosystem can handle these things up to a point. Push them beyond that point and they can no longer recover.

Q (By Mr. Khourie) Would this development push that ecosystem beyond that point, in your opinion?

A Yes, I believe it would, in the long range.

* * *

[161] Q Would you state your name, address and occupation for the court record, please?

A Austin Kent Andrews, 57 South Melrose Drive, Stillwater, Oklahoma. I am Assistant Leader, Oklahoma Cooperative Fisheries Unit.

THE COURT: You are what?

THE WITNESS: Oklahoma Cooperative Fisheries Unit, Assistant Professor, School of Biological Sciences at Oklahoma State University.

* * *

[162] THE WITNESS: Fish, Pesticide and Research Laboratory, Bureau of Fisheries and Wildlife.

A (The Witness, continuing) Returned to school, Colorado State University in 1964 – 1966, excuse me,

where I completed a Natural Science degree in Fishery Science in 1968; and a Doctor of Philosophy in 1970.

Since that time I have been with the Oklahoma Cooperative Fishery Unit at Oklahoma State University where I am teaching Research and Extension in the field of fisheries. My field specialization is population dynamics and river ecology.

Q (By Mr. Dalton) You have given your experience, your background and your education and degrees and so forth. Are you familiar with the system known as the Illinois River?

A Yes, sir.

Q And specifically with the fisheries aspect of it?

A Yes, sir.

* * *

[163] Q Based upon your experience and your knowledge, your observation, your studies and your education, do you have an opinion as to environmental impact on the Illinois River, specifically the fish life, as a result of development on that river?

A I guess basically the same type of items referred to by Dr. Buck also concerns me, that when you have a system that is being affected in some way to some degree by development of any type, you are going to have effects shown through that system of that development, such as nutrient loading that he referred to, in the case of the nutrient pool; and one thing I do disagree with, that septic water, if they are operated properly, are reduced to their basic elements. These are not cleansed. They remain with the aquifer until they are uptaken by primary producers, green plants.

So this can move hundreds of miles and has been shown to move hundreds of miles.

Q These are the things that go in from septics and may move hundreds of miles?

A Right. The elemental wastes, the wastes themselves are broken down into basic elements, which travel in the aquifer if that system is working properly. If not, other things are [164] released, but assuming the system is working properly.

All right, then you do have an input, a nutrient input into the subsurface aquifer. This is going to find its way in places into the river, if not directly into the river, at least through the leader streams that work there.

All right, I don't know how much is going down. I know that any difference that you make is going to be reflected by the biota of the river.

Q By the what?

A Biota, the combination of plants and animals that we have at the waters of the river itself; and the degree of change that you will observe will be dependent on the degree of input that you have from the source.

The same is true for sedimentation. If we have ninety-two miles of roads developed within this area, as I understand may be the case, and I am not personally familiar with it – Dr. Summerfeldt, unfortunately, could not be here today – you have a very great potential if we have one of these large rains, you have a very large sediment load emptied into this river.

You have gravel bars that are then filled with sediment that will no longer provide spawning places even under ideal conditions.

* * *

[168] Q (By Mr. Dalton) In your opinion, is there a need for additional information to be developed with

respect to development on the Illinois River so we may know precisely how to modify some of the problems that are associated with this river as a result of development?

A Yes. With no more information than I understand is available at the present time, I can't make any more specific projections other than guess, as if you give me a degree I can give you a change; but at the present time I can't do much more than that without more information.

It's very badly needed if you are going to assess the impact of any type of activity on the river.

* * *

[170] A I am Bill Cox, 8124 East 16th, Tulsa, Oklahoma, and I am in water pollution control with the Tulsa City-County Health Department.

THE REPORTER: The Tulsa what?

THE WITNESS: City-County Health Department.

Q (By Mr. Dalton) Give the Court, please, a resume of your educational background, including your degrees and any degrees you are working upon.

A Okay. I have a degree from Northwestern State College in Biology, with a minor in Chemistry and Math.

I am presently conducting my Masters at Tulsa University.

* * *

[171] Q As a result of your study, have you arrived at any conclusions or opinions as to the effect of development on fish population, fish movement or behavior?

A Well, any time that we are talking about a large development – now I am not talking about small developments, but major developments, I am familiar with storm water runoff, I am familiar with sewage, since this is my line of work, and I am also familiar with fish life.

I can't help but believe that it will have a detrimental effect.

* * *

Q Do you have an opinion or do you know whether or not any species of fish that are found in the Flint Creek area that you are studying are sensitive to water quality in any way?

A Yes, sir. So far I have found five garters, which are in the persidine family, which are very sensitive to any top siltation.

* * *

[172] Q What will happen to these fish ultimately if it continues as you see it continuing?

A Okay. Fish in streams as compared to fish that are in lakes are more sensitive to any type of oxygen depletion because they are used to, since streams are shallow, they have large surface areas, they are more exposed to termperature [sic] and ambient temperatures, you know, of the environment, along with oxygen and carbon dioxide from the atmosphere, and if there [173] is any, you know, any degradation at all of oxygen they are more sensitive to any type of change like this and therefore a lot of the species, they may not disappear completely, but their numbers will be reduced.

Q If you reduce the numbers of the species of fish, do you not have impact or results back down the food chain from those fish?

A Yes, sir. We are moving from a multi-specific to a mono-specific ecosystem which is less stable.

Q Less stable?

A Yes, sir.

Q Do you feel that it would be of assistance to you in more precisely determining the impact upon the fish life, the fish behavior and the fish population, to have additional, more detailed studies concerning development in this area?

A Yes, sir, because I have had experience with developments along creeks. I have seen species, you know, just completely be removed and I think an environmental impact statement should be made before this happens.

* * *

[176] A My name is Jerry Cleveland, 7088 East 52nd Street, Tulsa, Oklahoma. I am employed by the Tulsa City-County Health Department. [177]

Q Would you please give the Court a resume of your educational background including the degrees that you hold, sir?

A I received a B.S. degree in Civil Engineering from the University of Texas at Arlington. An M.S. degree – that was a B.S. degree – an M.S. degree from Stillwater, Oklahoma State University in Civil Engineering, and a Doctor of Engineering degree from the University of Oklahoma, Norman, Oklahoma.

* * *

[178] Do you have an opinion, based on all these things, as to the potential impact which may result, air pollution, for example?

A Well, just in general terms, not referring to a particular development, any sort of activity whether it

be a point source of pollution or indirect source of pollution, which indirect sources involve automobiles, then there is some sort of analysis that needs to be made in reference to the quality of air that exists there now and what possibly might be there in the future, to meet the federal, be their quality standards.

* * *

[181] Q What are the principal components of storm water as it begins its runoff in the situation you describe?

A You mean what are the contaminants that we are talking about?

Q Yes, sir.

A We measure the storm water contaminants just like the contaminants that come from point sources to the municipal [182] treatment plant, and this would be b.o.d., biochemical oxygen demand, suspended solids, colliforms bacteria, nitrates, phosphates.

Q And what are the colliform bacteria?

A The colliform bacteria is an indicate organism which we use to indicate the presence of – if you have these organisms present they might indicate contamination.

Q Are there any other chemical contaminants that may result from storm water runoff?

A Sure. In an urban area, some of the insoluble chemical things you might be talking about would be phenols, oil and gas – this is from automobiles; things of this nature. So there are many things and types of contaminants that could reach a stream as a result of urban runoff.

* * *

[190] A Thomas D. Peace, 1604 Cambridge, Norman, Oklahoma. I am Director of the Oklahoma Department of Pollution Control.

Q Would you please give the Court a resume of your educational background and the degrees that you hold?

A I have a B.S. in Psychology from Oklahoma State, an M.A. in Public Administration from the University of Oklahoma, an M.S. in Environmental Health from the University of Oklahoma, and a Doctor of Philosophy in Environmental Health from the University of Oklahoma.

* * *

[191] Q Could you give me a description, sir, brief description so that the record could be clear and understood, of your duties and responsibilities as Director of the State Pollution Control Coordinating Board?

A Yes, sir. I am not Director of the Board. I am Director of the Department of Pollution Control, which is the administrative arm of the Board.

I attend to the administrative activities of the Pollution Control Coordinating Board, including the coordination activities of environmental agencies in Oklahoma.

Q Now, so – again, what is the State Pollution Control Coordinating Board?

A This Board was created in 1968, and through some '71 amendments by the Oklahoma Legislature, it is composed of the heads of seven state agencies and two citizens appointed by the Governor, to work in coordinating the activities of pollution, environmental agencies in Oklahoma.

* * *

[194] Q Now based upon your experience and qualifications, do you have an opinion with respect to the Illinois River, as we have talked about it, as to whether it possesses any scenic values?

A Yes, I believe it does.

Q How about any recreational value?

A Yes.

Q Any fish or wildlife values?

A Yes, it does.

Q Any historic values?

A I don't know.

Q Any other values that you might ascribe to that river?

A These are some other values. The Oklahoma Water Quality Standards, which are prepared by the Oklahoma Water Resources [195] Board and reviewed by our Board, designates certain beneficial uses for the Illinois River.

There are a number of those in the documents you have in your hand there, including public water supply, recreational use, fisheries, in some areas of the Illinois, for disposal of properly treated waste, also for cooling water for certain kinds of industrial operations.

I can't remember them off the top of my head. There's about half a dozen beneficial uses that have been designated by Oklahoma Water Quality Standards.

Q All right. I will hand you what has been marked Plaintiff's Exhibit No. 3 for identification and ask if you can identify that, tell the Court what it is, please.

A This is the "Oklahoma Water Quality Standards, 1973", published by the Oklahoma Water Resources Board.

* * *

[208] Q Would the preparation again, thoroughly done and properly done, of an environmental impact statement be of assistance in addressing yourself to the problem of non-point sources of pollution?

A Yes, it would.

* * *

Q (By Mr. Dalton) Based upon your experience, qualifications, your background, your education, your duties and responsibilities currently, your observation, do you believe that an environmental impact statement should be prepared prior to development being done along and adjacent to the Illinois River and the Illinois River Basin?

A Yes, sir.

* * *

[233] Q Would you state your name and address for the Court, please, sir?

A Thomas Aley, 1025 South Roanoke, Springfield, Missouri.

THE REPORTER: How do you spell your last name?

THE WITNESS: A-l-e-y.

Q (By Mr. Dalton) Mr. Aley, I will ask you to speak up so [234] we can all understand you, please.

What is your occupation, sir?

A I am a consulting hydrologist and Director of the Ozark Underground Laboratory.

Q All right, sir. Would you give the Court, please, a resume of your educational background and any degrees that you hold?

A I have a Bachelor of Science degree in Forestry, University of California, Berkeley; Master of Science in Forestry with emphasis in forest hydrology, University

of California, Berkeley; additional graduate work toward a Ph.D. in Geography at Berkeley; in Watershed management and Geology at the Univeristy of Arizona, Tucson; and in Geography, Geology, Southern Illinois University, Carbondale.

Q Do you have any academic experience?

A Yes. I have taught at the University of California, Berkeley; University of Arizona, Tucson; School of the Ozarks, Point Lookout, Missouri.

Q All right, sir. Do you hold any honors?

A I have a couple in honorary Forestry, fraternity awards, from when I was with the federal government, U.S. Forestry Service, for superior performance, and an award from the National Speleological –

* * *

[236] Q Have you personally visited the Illinois River on occasion?

A Yes, I have.

Q Now do you have an opinion, based upon your knowledge, your experience, your background and your observation, your [237] studies, as to whether or not development on the Illinois River, including the Flint Ridge Development, or adjacent to the Illinois River or on any of its principal tributaries, will have an effect upon or impact upon the human environment?

A Yes. My opinion is it definitely would.

Q Would you tell the Court what that opinion is, please?

A All right. I see a range of problems now occurring, potential problems which can be anticipated on several fronts.

Let me speak first to the problem of septic tanks, and their use in this type of terrain, this type of

hydrogeologic setting. That means water and the rock, the kinds of soil, the kinds of geology that we have here.

* * *

A The first problem I see relates to the use of septic tanks in this type of hydrogeologic setting. You are dealing [238] with Clarksville and associated soil series and you are dealing with soluble rocks. These are rocks that can be dissolved in sedimentary ground water.

Now many of the, like in the Reed Springs formation, you have a lot of chert in the formation. That is an insoluble rock but it is bound together by soluble rock.

Septic tanks basically are designed for use in good agricultural soils, and this is something that needs to be borne in mind; and much of the Ozarks does not consist of good agricultural soil.

The soils that we have here do not provide very good absorption of the materials introduced into them, and they don't provide effective filtration.

I say this based upon experience and based upon studies which I have done both for the U.S. Forest Service and for the Missouri Clean Water Commission.

* * *

[243] Q Now with respect to the areas we are talking about, the Illinois River Basin, what classes of materials, or what environmental problems do you foresee, potential problems as a result of septic systems for three thousand home sites?

A All right. You have the problems with pathogenic material, the bacteria and the viruses. I believe this is an important consideration. And equally – let me rephrase that.

An even more important consideration is the movement of nutrients, and particularly nitrogen.

* * *

[246] Q Now what are the effects on plant life associated with the stream as a result of the introduction of nitrogen?

A When you add nitrogen to water, you are adding fertilizer. Fertilizer helps plants grow better. That is why the water has less clarity, because there are many plants growing in it and that is what reduces the clarity of the water; so you are fertilizing the microscopic plants and you get such an abundance of them there, plus some of the macroscopic plants as well, phylomentus green algae and such as this. You lose water clarity and you get more of what people call the slime on the rock, which is largely phylomentus green algae.

So as you add nutrient to a stream, you are increasing the plant material in that stream.

Q Does the increase of plant material in the stream make any differences with respect to other forms of life in the [247] stream?

A Yes. In any ecosystem if you change one thing you change everything else in the system. That's, that is sort of a basic concept. You will move from one type of fauna, this is animal life in the stream, to another.

* * *

Now you mentioned human health problems initially. What human health problems do you perceive will result as a result [248] of the use of septic systems along the Illinois River?

A I would think that with the use of septic systems that you are going to get more bacteria and viral material moving into the river than is currently the

case, and any time you have more of this material you are increasing the human health hazard.

Many of the viruses are very long-lived things. Bacteria, some of them, are pretty long-lived as well.

As you deal with ground water conditions in the Ozarks, you find that these things can travel great distances.

* * *

[251] A One of the problems I saw when I was out there relates to sediment production.

I drove a number of miles of road out there and in my driving I noticed quite a bit of erosion along the road. According to some of the things I have seen from the developer's handout sheets, they are proposing something on the order of ninety to ninety-five miles of roads.

In all of the roads I drove, I saw no road stabilization, no grassing of the right of way, no grassing of the disturbed areas at all. Many of the road cuts are very high angle, the road fills are high angle. These produce more sediment than do lower angle cuts, lower angle fills, which are sodded.

In one place I saw some gullies that were three or four feet deep, which had formed already; a lot of sediment is being produced from the area, and ultimately it's going to appear in the Illinois River and some of it already has appeared.

During the time that I was floating on the river, we passed a hollow that came in from the development side of the [252] river. I don't know if it has a name. It was immediately downstream of a round house setting on a bluff. It was built by the developer and it shows up in some of their pictures.

This particular hollow drains quite a bit of the area where development has been taking place, and when we floated the river I noticed that vegetation on the development side of the river downstream of the confluence with this hollow was significantly muddier than was the vegetation on the nondeveloped side.

It was muddier because of the storm of about two months ago.

What this tells me is the water draining out of that hollow was carrying far more sediment than was the water flowing in the Illinois River.

Now prior to development, when that was woodland area, the vegetation should have been much cleaner on the right side than it was on the left side, but the way it was, after the development the vegetation was much muddier on the right than on the left side.

* * *

[253] Sediment can do a lot of damage to the aquatic life in a stream. One of the aquatic animals I have been involved with in work that I did for the United States Forest Service, where I did a lot of work on the Eleven Point National Scenic River.

Q Where is the Eleven Point National Scenic River?

A It's in Missouri, in Shannon and Oregon Counties.

Q Is that in the Ozarks?

A In the Ozarks, yes.

The work that I did there indicated that there is an organism in the stream that is very important, and this is the web spinning caddis fly, that's c-a-d-d-i-s fly. It is a little bug that lives in the stream and spins a web to catch its food, and its food is fiber plankton.

The web serves to knit many of the little rocks in the [254] streams together, and knits them to the

bigger rocks. If you pick up a rock out of the stream you will find a lot of little rocks attached to it.

What this animal does is maintain channel stability. He ties all the little rocks together with his webs, so the channel is very firm.

In the work I was doing in the Eleven Point Basin, we found that sediment was very destructive to this web spinning caddis fly. You can't catch your fiber plankton with a muddy net, seems to be the problem. The abrasion is very destructive.

Say there would be a road crossing. The caddis fly population would drop off significantly downsteam of it, and the channel would lose its stability and you would lose the pool and riffle nature of the stream.

What I saw in the Illinois River was – I hunted around a long time before I found many of this, before I found any of the web spinning caddis flies, but they were there; but they are not there in the kind of abundance that I am accustomed to seeing them in the higher quality streams of the Ozarks, and I think the reason they are not there is in substantial part because of sediment loads in the stream and as soon as I got in a canoe to go down the stream and pushed out and walked in the gravel, as soon as I walked across the gravel, I knew there wasn't many well sustained caddis flies where they had been, [255] something had happened – as soon as I got out on the stream, because the gravel was loose.

Q The gravel was what?

A Loose, it wasn't knit together, and any time – I got out several times to walk around in the gravel, and this is what I found all the way down.

Now I have not done extensive studies way upstream of this and I don't know what the conditions are there,

but I do know that the web spinning caddis fly is a very important organism, and I do know that he is distinctly affected by sediment.

Q Now what is the effect of changing the stability of the stream, why should we be concerned with changing stream stability?

A Well, there are several reasons we should be concerned. It is going to affect fish habitat. It is going to affect the productivity of the stream, how many fish you have. It is going to change the nature of the stream, the pool or riffle nature. An unstable stream will tend to develop uniform rage rather than pools and riffles that characterize the stream today.

It is also going to affect how much bed load material, and that's the gravel stuff on the bottom, how much bed load material is transported down the channel.

Q And if that bed load material is transported down the [256] channel, do you know where it then will go?

A The first dam.

* * *

[257] Q Now are you familiar with the preparation, general purposes of an environmental impact statement?

A Generally, yes.

Q In your opinion, would the preparation of an environmental impact statement, properly and thoroughly prepared, be of assistance in precisely determining some of the impacts as a result of sedimentation, some of the impacts on human health, [258] some of the impacts as a result of or resulting from the nutrients into the river – would that impact statement be of assistance in establishing those impacts, perhaps minimizing them, at least pointing out to the public where they are?

A Yes, it would.

Q In your opinion, should one be performed in this case?

A Yes, sir.

* * *

[260] Cross Examination by Mr. Thieman:

Q Mr. Aley, I gather by your testimony on direct examination that your tests that you have applied are tests which you yourself have made but are not generally accepted by governmental authorities as being the type of tests that prove or disprove whatever tests that you were trying to conduct?

A They are techniques which are new techniques recently developed to evaluate the effect of septic tank systems on ground water systems. You see –

* * *

Q (By Mr. Thieman) Mr. Aley, as I understood your testimony on direct examination, the test that you made of the camp trailer in the Ozarks next to the water well, that the method that you used in connection with that test to determine whether or not fluids from the septic tank were getting into the water [261] was the method that you alone had used and that you had developed, is that true?

A It is a new technique, but in addition to that I was sampling for total colliform, fecal colliform, all tests performed in accordance with the standard methods, which is the bible for water quality work. It is an acceptable, the use of Lycapodium as a tracing agent is an acceptable technique. It generally falls outside of the technical competence of most people working in the field of Public Health. It falls within the competence of my field.

* * *

Q Now then, are they especially identifiable like a human being is?

A Yes, because I developed a technique for staining them, with special purpose microbiological stains, so that they are not only spores which are not natively found in the area, but they are also stained so I can identify them; so there is no, [262] no question but what I am getting the spores, and not many people are buying Lycapodium spores and when they do buy them, they are all colorless. They are used primarily in the pharmaceutical industry.

Q Now then, is that one experiment the basis of your opinion that the septic tanks in the Flint Ridge Development will do exactly the same as the test that you conducted in the Ozarks?

* * *

A (The Witness) No, that is only one of a number of similar investigations.

Q (By Mr. Thieman) Okay. Isn't it possible with respect to the one experiment about which you have testified, that's the only one that you have told the Court about – did you actually follow the course of the water to determine whether or not there could have been an air space or a water space where the water had actually channeled itself right into their fresh water supply, which could be a unique situation in and of [263] itself?

A I believe this is the way it typically does occur. No, of course I didn't flush myself down the toilet and go through the pipe to follow it.

Q Well, then how did you without making that type of inquiry, how can you compare that situation to the soil situation at Flint Ridge?

A Very similar soils, similar hydrogeologic terrain.

Q Did you take a soil sample in the Flint Ridge area?

A I read the soil reports.

Q Did you take a soil sample?

A No.

Q Did you make any ground test borings in the Flint Ridge area?

A That is not applicable to the investigation.

Q I just asked you if you did that, please, sir.

A No.

Q Where was the exact location of this experiment that you testified?

A At Blair Tower Lookout near Doniphan, Missouri.

Q And where is Doniphan, Missouri?

A Doniphan, D-o-n-i-p-h-a-n.

Q Okay, where is that?

A Oh, it's in Southeastern Missouri in Carter County.

Q How far is that from Tahlequah, Oklahoma?

[264] A Probably two hundred and fifty miles.

Q You are telling this Court that conditions two hundred and fifty miles away from Flint Ridge is exactly the same as it is in Flint Ridge, is that right?

A No, I am not telling them that, and I said that in my direct examination. I am saying there are great similarities, and I pointed out, I believe, that no two areas are ever identical; but based upon my professional judgment, my expertise, I believe that conditions are similar enough that this case serves to illustrate the problems which can occur.

Q But you to this date have never taken a soil analysis of any of the soil on Flint Ridge property, have you?

A No, sir. I would expect to ask permission before I did anything.

Q Did anybody stop you when you were going through the Flint Ridge project?

A No.

Q Now then, you say that you are familiar with the Flint Ridge project, is that correct?

A That's right.

Q Will you tell the Court what inquiry you made with respect to Flint Ridge?

A I looked at the land.

Q You looked at the land and how long did you look at the land?

[265] A For a day.

Q For one day, and what else did you do?

A I looked at the land from the river and I looked at the river. I spent a day out in the area, part of the day driving the roads, looking at the surface through the development, and then part of the day on the river.

I read material from soils reports and any material I could get hold of. I look at state geologic maps and reviewed Masters thesis down here at Oklahoma University on the geology of the area.

Q And whose Masters thesis did you review?

A The name was Gary, I believe it's Gurlee, G-u-r-l-e-e. I could get you the complete reference. It would appear as one of the references on the bottom of the state geologic map, entry number 70, if I am correct.

Q All right. Now what other inquiries did you make with respect to the Flint Ridge Development?

A I believe that's all.

Q Did you make any inquiry with respect to the type of septic tanks to be used?

A No, I would presume –

Q I just asked you a question, yes or no.

A No.

Q Make any inquiry as to the size of the lots in Flint Ridge?

[266] A I have read the literature and I am familiar with it from –

Q Tell me the average size of a lot in Flint Ridge.

A There's 7000 acres, 3000 house sites. You can do the division there. It would be about two and a third acres per house.

Q Two and a third acres per house. Now the mobile home experiment that you made, I assume was a mobile home that is what I call a camp trailer, is that right?

A No, it wasn't a camp trailer.

Q Isn't that what you said on direct examination?

A No, it was not.

Q All right, what was it?

A It was a mobile home probably 50 or 60 feet long. It was at least half a mile from the nearest neighbors, which would mean it had a 640 acre lot.

Q I see, and the well was how far from the mobile home?

A From the mobile home or from the septic system?

Q From the mobile home.

A Probably in excess of 100 feet.

Q Now are you contending to this Court that the water supply in the Flint Ridge is going to come from water wells?

A No.

Q Is that your information?

A No.

[267] Q Now then, you are telling this Court that if you have one home to two and one-half acres, and you spread out a septic tank field over that two and a half acres, that that is going to contaminate the Illinois River?

A In this type of hydrogeologic survey, yes.

Q And how is it going to drain into the river if the drainage is away from the river?

A I have seen no evidence that indicates to me that the subsurface drainage is going to be away from the river.

Q What study have you made to determine where the subsurface drainage drains to?

A I read this Master's thesis down at O.U. on the geology.

Q So you are relying upon a thesis that somebody did at O.U. rather than your own inquiry and investigation, is that correct?

A It takes a great deal of –

Q I said, is that correct or not?

A Yes.

Q What studies have you done to determine what happens to the effluent in a septic tank system that flows through soil similar to what you are talking about in the Ozarks with respect to filtrating the water and making it again potable?

A I have done a number of studies tracing water with dyes, which are subject to high absorption to get a measure of the absorption capabilities of the subsurface, and I have done a [268] number of traces with Lycapodium spores.

Q How far does the water in the type of soil we have in the Flint Ridge project, how far does that water have to travel before it again becomes potable?

A You are talking about for drinking?

Q Uh huh.

A I cannot give you a number, and this is the problem with septic tank regulations.

Q I see. You have not arrived at a number as a result of these studies, it that correct?

A This subsurface is very variable and this is a problem you cannot get a number that is meaningful.

Q That is your opinion?

A Based on a great deal of data.

Q But that is just your opinion?

A That is my opinion.

Q And that opinion is not based upon any solid analysis of the soil in Flint Ridge?

A No, obviously.

* * *

[275] Q Would you please state your name to the Court and record?

A John Montgomery.

Q Mr. Montgomery, where are you employed?

A I am Administrator for the Office of Community Affairs [276] and Planning for the State of Oklahoma.

Q What are the duties and responsibilities of the Office of Community Affairs and Planning?

A Well, to operate and administer the Office of Community Affairs and Planning, and advise the Governor and the Legislature on problems relating to community affairs and the coordination of planning within the state of Oklahoma.

Q Now Mr. Montgomery, would you please tell the Court a little bit about your educational background?

A Well, I got a Bachelor's degree from Princeton University and a Law degree from Georgetown Law Center.

* * *

[277] Q Now on the basis of your knowledge and familiarity with the Illinois River, do you consider the river to have any unique and important scenic value to Oklahoma?

A Well, I think it does, and particularly since I work for the Legislature and they have designated it as a Scenic River, I certainly think it does.

Q Do you also perceive a recreational value from a planning [278] standpoint in the Illinois River?

A I think it's one of the primary recreation areas within the state.

Q All right. What impact is there in terms of economic value of recreational facilities from your position as a planner?

A Well, we probably, in Oklahoma the only trend that has been reversed in our population development in the last forty years has been the redevelopment of the eastern Oklahoma area, now particularly in southeastern Oklahoma, deep southeastern Oklahoma, it was Weyerhauser and northeastern Oklahoma also.

Recreation and development, the kind of development it is, is a major factor in the economic turnaround in that area. Of course, I think some of this is based on, in fact I think a lot of it is based on the fact that it is a very pleasant place to live, the clear water, adequate water, the lower prices involved as far as the cost of living. Of course I think services are increasing. That's what we are working on.

Q All right. Now of these values that you have just discussed, the scenic value, the recreational value, the

economic value, do you perceive any threat to these values by development, using the general term, along the Illinois River?

A Well, this is probably the next big issue that we face within the state. There is a threat, there is a threat there. There is a threat of strip mining, a threat in deep southeastern [280] threats?

A Well, you have a river that has been used by the natives of the area primarily recreational, from Oklahoma City and Tulsa, some from Missouri and Arkansas, and there is unlimited access.

Well, property owners access was sort of a negotiable issue, and so we have had good access along the river.

If the development is set up for four or five miles there is the issue of limited access as to where the public can get off the river and get on the river. I think some things have been brought out in the testimony. Of course any time you do have large scale development, you have the issue of erosion. This comes in because we do flood planning. We are the conduit for HUD for that, and now around the state, you know, it's not going so well.

We have these variances, but generally we try and deal with these, if we can't get a better scheme within the state for how to handle and assist local governments, we will deal with these kinds of development issues; but you know I would say again, that development has a favorable economic impact and our role is to try and get in and mitigate the problems that arise from what we consider a favorable impact.

Q What are some of the impacts that are in the nature of environmental, but are not the grass, trees type of environmental impact that will occur in this general area in Adair [281] and Delaware Counties?

A Well, you know, I am as far as getting specific on that, I think it would be speculation. It's just hard to determine. As far as development, our job is to write a development plan for Oklahoma. Any time you move toward new population, toward new economic activity, you can trace other indicators, transportation issues, education issues, sometimes those work out fine and sometimes they have an adverse effect.

Q All right. Is it your opinion, as I guess Chief Planner for the State of Oklahoma, as the Administrator of the Office of Community Affairs and Planning, that a preparation of an environmental impact statement would be beneficial to you and your agency in the performance of your duties in the planning function?

A I think it would be beneficial to our agency and I think it would be beneficial to the Flint Ridge people.

* * *

[299] Q Will you please state your name for the Court and record?

A Monty Murphy, that's M-o-n-t-y.

Q Mr. Murphy, what is your occupation?

A I am Planning Engineer for the Oklahoma Highway Department.

* * *

[300] Are you familiar with the location of the Flint Ridge Development?

A Yes, generally familiar with the location.

Q Where is it located?

A As I understand it, it's located on the south side of State Highway 33, on the east side of State Highway 10, on the west side of Flint Creek, in Delaware and Mayes Counties.

Q I am going to hand you what has been marked for identification Plaintiff's Exhibit No. 8, and ask you what these are.

A These are county maps that are prepared by the Highway Department in the Planning Division, and we use them and of course they are available for sale to anybody who wants to use them, standard county maps.

Q Are these true and correct copies of the maps on file with the Highway Department?

A Yes, they are.

* * *

[304] Q Critically inadequate. What is the rating contained in the 1972 Sufficiency Rating Report for Highway 33, the major east-west highway?

A Well, which portion of it?

Q Directly adjacent to the development.

[305] A Generally speaking, that highway rates 41 to the east of State Highway 10 and oh, 51 and 45 to the west of Highway 10, which is in the critically inadequate stage.

* * *

Q All right. Now what would be the effect increased traffic on the State Highway 33 sufficiency rating?

A The rating as I have said is compared to a standard, and the traffic dictates which standard you use, whether you build a two lane or a four lane or a freeway type of facility, so of course the higher the traffic the higher the standard would be.

Q What would happen to the sufficiency rating of Highway 33 if ten thousand people were living along that route?

A Well, if there were, for example, 10,000 additional trips on the route, it would probably call for a higher standard, which would mean that the sufficiency rating would go down and it would become more inadequate.

Q All right. Now what is the sufficiency rating of Highway 10 as it passes by the Flint Ridge Development in that segment below Highway 33 intersection?

[306] A 10 to the south has a sufficiency rating of 58.

Q What does that numerical rating, what does that numerical rating place the highway in?

A That's also in a critically inadequate range.

Q Would the same effect of increased vehicle, I think they call it VMT, vehicle miles traveled, or trips, be the same on Highway 10 as on Highway 33?

A Well, those are, that's average daily traffic, and yes, the same effect would hold true on 10 as on 33.

Q And the sufficiency rating would fall even further?

A Right.

* * *

[313] Q All right. I believe your testimony was that the impact of the development will be to further lower the sufficiency rating more in the critical area than now?

A That's right.

* * *

[316] Q Will you state your name and address for the Court, please, sir?

A Marvin W. Baker, Jr., 300 Hal Muldrow Drive, Norman, Oklahoma.

Q What is your business or profession or occupation?

A I am Associate Professor of Geography, University of Oklahoma.

* * *

[318] A (The Witness) I hold a Bachelor's degree from the University of Northern Colorado. I hold a Master's degree from the University of Northern Colorado. The Bachelor's degree was in social science and biological science; Master's degree was in geography, social science.

I have a Ph.D. from Syracuse University in geography.

* * *

[320] Q What would a geographer mean if he talks about a functional perspective?

A If we take a look at the proposed development here, I as an urban geographer – I consider that one of my chief specialties, to deal with how man uses land in an urban context, how he organizes himself in subdivisions, how he decides how to use land, how he comes into conflict when he decides a single parcel of land might have three or four alternate uses – how these things are resolved, the different value systems we bring to such a case.

If we take a look at this development, my own judgment is something along this line: We are dealing here, if we look at the map, look at this 7000 acres in the Illinois River basin as it is outlined here, we see an intrusion into the area that has historically been of slow growth, small towns, rural settlements, a rather pastoral setting in general, we are seeing an intrusion of something that is essentially urban in character.

In other words, this 7000 acres and perhaps the 14,000 acres across the river if that should be added at

a future time, and other developments as well, are essentially islands of urban type development. They are not indigenous to the functional structure of the basin as it now exists.

[321] By this I mean the kind of housing that is planned here, the layout of lots, the pricing, the appeal to an interested segment of the population is an urban oriented one. We are talking about whether in essence a middle income suburban development that is being draped across this terrain, an urban development that we might find around the fringes of Oklahoma City or Tulsa.

Q Can we consider this particular development, the Flint Ridge Development, in a vacuum, standing alone, or do we consider this development in terms of the basin as a whole?

A By professional training, geographers would rebel very much about any effort to look at a problem in a vacuum of this sort.

Personally I have long been aggrieved in cases of this sort and many others when we do try to separate a part of a problem from its surroundings, because they are tied together and I see many complications, many problems, that can be brought about by this type of development in this kind of a social and economic setting, that I don't think that many of the local officials are really prepared to deal with.

Q What alterations do you perceive actually or potentially in the, we'll say landscape of the area?

A When we talk about the landscape changes, we have had a discussion about the various pollutant conditions and I will not address that.

[322] Essentially we are talking about land in northeastern Oklahoma in this basin, land that has

never been productive agriculturally, land that is very steep in terrain, land that it is difficult to see attracting a dense population in the traditional sense, land that has high recreational possibilities.

We are draping this subdivision, with its single family plots, across this terrain and we are making the assumption then that this is somehow the collective judgment of man that this is the best and highest possible use for this particular part of the terrain.

I would submit that among the things that needs to be considered by local officials, planning agencies, the state and other parties, is what we want the Illinois River basin to be in the year 2000. We are dealing here with – and socio-economic conditions are really atrocious for the state of Oklahoma. How does this basin fit into what is essentially an urban population in this country?

And if we take a look at the map and we see, we can almost swing an arc from Tulsa through Muskogee and on east down the Arkansas River and see a large crescent of urbanizing development. This is where the population is going to be in the next twenty or thirty years. Everybody talks about it. This is where the pressure is going to be on land.

I say when we look at these northeastern uplands, and [323] that includes most of the Illinois River basin, this is our recreational reserve.

If it is to be our recreational reserve, how do we assign certain valuation for particular slopes, for particular landscape associations, for particular vegetative characteristics?

And among the most attractive areas for open space, and open space preservation, are these relatively large

blocks of steep terrain that form the escarpment of the Cookson Hills or the Cherokee Hills as some people want to call it, and the Boston Mountains.

They provide a great resource for recreational use in the future.

If I may continue, I might state here that in some ways by our development of what is essentially an urban form of land use draped across, literally draped across this rough terrain, this is precluding our option, our options to make a collective decision at a later point in time, as to how we want to use this resource, because what we are doing here is giving approval to a subdivision of these large blocks of land and saying that each of us individually, at least those that will be attracted and can afford to buy land in this type of development, these people will come and they will attempt to create their own private, quasi-private rural retreat, complete with guardhouses, blocks of land set apart for [324] the private enjoyment of those who can afford to enter.

This bothers me some as a geographer, again taking this broad perspective. I think we have to deal with the whole eastern end of our state. As the presssure for more of this kind of subdivision occurs, our opportunities for acquiring and protecting large blocks of attractive open land for the public are going to be reduced.

* * *

[325] The question was this, does a community economically benefit automatically when a developer says, "We will build so many homes in this area and you will receive so much in taxation."

[326] One study done in Barington, Illinois reveals that four bedroom homes, even $100,000 homes on

five acre tracts, would require more in public expenditures than they would provide in property taxes, while they come up here with a report that says small apartments would be more suitable.

A similar study in Palo Alto, California recommended that the city acquire substantial open area in the foothills area as permanent open space because although twenty-two alternatives for land use were considered, none of them would provide revenue to the city of Palo Alto, which is not a poverty stricken area by any means, they would not provide revenue to the city of Palo Alto equal to the costs that would be accrued to the taxpayers of the city.

I would quote here, "Even though two-thirds of each property tax dollar is paid by non-residential development in Palo Alto, it was found that $45,000 homes would have to be priced at $62,000 and $80,000 homes at $116,500, if they were to pay their own way."

A third study, in Charlottesville, Virginia, or in open country nearby, came to relatively similar conclusions, that development would exceed costs.

Now we don't have enough of these kinds of studies. I am unaware of any study in Oklahoma that weighs cost benefit ratios here.

Q Now let us assume that development proceeds in the Flint

* * *

[330] Q Does this result in any burdens on local or state government?

A It can in this sense: if a great number of lots are actually sold, the ownerships transferred thereby and they are not developed, development may be very scattered, the land may end up with a clouded title ten years, fifteen years, twenty years from now, there may

be a burden in terms of future planning that would like to recover title to this because of this subdivision, this fragmentation of land.

This has been a problem in many cities and certainly can be a problem in second home development.

Q Would you relate these perspectives to an environmental [331] impact statement; in other words, in the National Environmental Policy Act, they refer to studies dealing with relationships between local short term uses of man's environment and the maintenance and enhancement of long term productivity.

Would these types of studies and this type of information relate to that, addressing answers to those questions?

A Yes, it would.

Q Would it relate to some degree to addressing answers to questions involving irreversible, irretrievable commitment of resources?

A It most certainly would.

Q Would it relate to answering questions concerning adverse environmental effect which cannot be avoided if the proposal be implemented?

A Yes.

Q And suppose if we had the information and wished to make certain decisions, would it relate to the alternatives to the proposed action?

A It could, yes.

* * *

[338] Q Will you please state your name for the Court and the record?

A Kirk Breed.

Q Would you spell it?

A B-r-e-e-d.

Q Mr. Breed, will you state your occupation?

[339] A I am the Director of the Office of Outdoor Recreation and Planning of the Division of State Parks, State of Oklahoma.

Q Would you please tell the Court a little bit about your background, educational attainment, matters of that nature?

A I have got a Bachelor of Science degree in Ecology and Zoology from Oklahoma State University; spent ten years with the federal government in Latin America in the planning and design of national parks with the Peace Corps and with the U.S. A.I.D. Mission.

* * *

[340] Q (By Mr. Ikard) Do you perceive any cultural value to the Illinois River?

MR. THIEMAN: We will stipulate there is cultural value to the Illinois River.

MR. IKARD: I'd like to have his answer on that, your Honor, because I believe he could bring his professional

* * *

recreationist and a person involved in the planning of

* * *

[346] access to a resource you increase the number of people that are using that resource; so as an example, if there are three thousand families living in the Flint Ridge Development and they have their children and their guests visiting them every day, then that is going to increase by that particular number, whatever all of that is put together, the number of potential users on the river itself.

So therefore we have here a recreational resource with a maximum in terms of what it can use or can take care of, and that number being increased.

Q Have you formed an opinion as to whether or not Flint Ridge Development would overtax the resource?

A No, I couldn't say that.

Q Would the preparation of an environmental impact statement in proper form assist you in the formation of an opinion?

A Yes, it would.

Q Would the development of an environmental impact statement assist you in any planning function that you may have?

A By all means, yes.

* * *

[361] Q Will you please state your name for the record?

A My name is Bob Nichols.

THE COURT: What?

THE WITNESS: Bob Nichols.

THE COURT: Bob Nichols?

THE WITNESS: Yes, sir.

THE COURT: Talk loud enough so everybody can hear you, will you, please, Mr. Nichols?

THE WITNESS: All right.

Q (By Mr. Ikard) Mr. Nichols, how are you employed?

A Work for the Oklahoma Consumer Protection Agency, a division of Community Health and Preventative Medicine.

Q And what specifically kind of training do you have with regard to this, in terms of educational background and job experience?

A A graduate from Oklahoma State University, Bachelor degree in Political Science; then attended the

Oklahoma University [362] Health Sciences Center in Oklahoma City; presently doing graduate work there.

In addition, I have been employed as a consultant to Health Care Facilities in cities around the United States to make recommendations as to whether or not they should either expand their facilities or not.

I have also worked with the Legislature, the Honorable Legislature of the State of Oklahoma, in their deliberations concerning Oklahoma University Health Sciences Center; and the State of Minnesota.

Q All right. Now Mr. Nichols, make this as brief as possible. Have you done an inventory of the medical care facilities available in this area?

A Yes, sir.

Q Would you tell the Court what they are?

A In Delaware County there is a 25 bed hospital in Jay and a 25 bed hospital in Grove. These are conforming beds by both state and federal standards.

There are no long term care facilities in Delaware County.

Q What do you mean by long term care facilities?

A A long term care facility is intermediate between a nursing home and a short term care hospital.

* * *

[363] Of the ten services that hospitals are normally expected to have by the State of Oklahoma, four are available in Delaware County.

There is not, or they do not have radiation therapy, intensive cardiac care or intensive care. It's just something not available.

In Adair County and Cherokee County, in the Community General Hospital category, there are 37 existing beds in Adair County. They are not conforming by both state and federal standards.

There are 50 beds programmed as being needed, and these consist of thirteen new beds plus the 37 old non-conforming beds being replaced.

* * *

[379] By Mr. Dalton:

Q State your name and address to the Court, please, sir.

A David R. Strickland, 1509 North Main Street, Muskogee, Oklahoma.

* * *

[381] Q Did you undertake to obtain or prepare a petition drive concerning legal protection for the Illinois River?

A Yes.

Q I hand you what has been identified as Plaintiff's Exhibit No. 6 and ask you to identify that, sir.

A These are Xerox copies of original petitions which were circulated by the Illinois River Conservation Council and the Scenic Rivers Association and some of the member organizations of the Illinois River Conservation Council, to obtain signatures expressing their concern about the Illinois River; and this is copies.

Q Approximately how many names do you have on there, sir?

A 11,394, I believe.

* * *

[428] By Mr. Harris:

Q Will you please state your name to the Court?

A My name is R. LeRoy Carpenter.

Q What is your occupation, Dr. Carpenter?

A State Commissioner of Health and Chairman of the State Department of Pollution Control Coordinating Board.

Q In your capacity as State Director of the Department of Health, are you responsible for the enforcement of rules and regulations of the State Department of Health and the approval of septic tanks?

A Yes, we are.

Q I hand you what has been marked as Defendant's Exhibits [429] 1 and 2 and ask if you would identify those, please.

A Defendant's Exhibit 1 is the Oklahoma Water Pollution Control statutes that are administered by the State Department of Health, and Defendant's Exhibit 2 is the rules and regulations entitled State Department of Health Engineering Bulletin No. 600, dealing with septic tanks and subsurface tile systems.

Q Are you familiar with these rules and regulations?

A Yes, I am.

Q Yesterday, Dr. Carpenter, a witness testified, his name was Jerry Overton, that testified that waste material would run into the river as primary sewage.

Is this a true statement?

* * *

[430] Q (By Mr. Harris) Is that a true statement, Dr. Carpenter?

A In my estimation it is not a true statement, if those septic tanks are truly installed as the rules and regulations of the State Department of Health so state.

Q Where will the effluence go?

A The effluence from a septic tank?

Q Yes.

A The effluence from a well installed tank, designed and installed according to the State Health Department regulations, would go into the subsurface soil.

Q What happens when it goes into the subsurface soil?

A The various kinds of biota that were referred to by previous witnesses, very small organisms, bacteria, fungus and soil particles, would absorb the various nutrients and the so-called pollutants into the particles in the soil and the water then percolates through the subsurface soil to appropriate levels.

Q In terms of pathogenic diseases and the nitrates and phosphorous, do they have a detrimental or a beneficial effect?

A In most situations the nutrients, nitrogen, phosphorous, have a beneficial effect on the soil and the biota.

* * *

[442] Q Do you know whether or not it is either the best practical or the best available technology with respect to the Illinois River basin, the Flint Ridge area?

A In my general knowledge of the Health Department and its activities, I would say that in some areas, some specific areas in the Flint Ridge Development, in the Flint Ridge Development that the septic tank method of treating sewage would be very acceptable and the best practicable at this time.

There are other areas, most likely yet undetermined, that septic tanks would not be acceptable according to the State Health Department standards. Those have not yet been decided. They have not been tested yet.

Q So we have a situation, do we not, in which we have a lack of sufficient data or knowledge to make that decision with respect to those latter areas?

A Talking about – we have insufficient data to define any individual lot, not that we have insufficient data on the entire Flint Ridge project.

Q Can you state here today as a matter of fact, without qualification, that the use of septic tanks in the Flint Ridge area would not result in indirect pollution in the Illinois River?

A Yes, my statement is, as you recall, that if those septic tanks are installed and operated in accordance with the State [443] Board of Health rules and regulations, 1-904, as listed in that bulletin, Defendant's Exhibit 1, that it would not, those septic tanks would not result in polluting the Illinois River.

* * *

[448] By Mr. Thieman:

Q Would you state your name to the Court, please?

A John H. Armstrong.

[449] Q And where do you live, Mr. Armstrong?

A 8500 Meadow Lark Lane, Oklahoma City.

Q And what is your duty, business or profession?

A I am a Regular Professional Sanitarian in Oklahoma, employed by the State Health Department, in Environmental Health Services of the State Health Department.

Q You have brought with you certain records that the Court requested Dr. Carpenter to produce in court this morning; have you brought those records with you?

A Yes, sir, I have.

Q I hand you what has been marked as Defendant Flint Ridge's Exhibit 1 and would you identify that document, tell the Court what it is?

A This is a document, first of all, it's got a letter of transmittal on the front of it, and then the second letter is a certification that this is a true and exact copy of a percolation test on the Flint Ridge Addition, which was performed by a Registered Professional

Engineer in Oklahoma; and these are the percolation tests that we used in approving this plat, for the use of a public water supply and the use of individual sewage disposal system.

Q For the Flint Ridge project?

A For the Flint Ridge project, yes.

Q Would you explain to the Court what a percolation test is?

[450] A Well, this is a procedure that we use to determine how fast soil will absorb water, and it is used pretty uniformly throughout the United States. Most all the health departments accept this as a procedure, and the range on it is, the procedure is to dig a hole any size in diameter, anywhere from 4 to 12 inches in diameter, and fill the hole full of water, let it presoak, and then after at least four hours presoaking, put six inches of water in the bottom of it and then you time the drop of water in this hole, and this way we can determine how porous the soil is.

Of course with real tight soil, it takes more absorption range than if it's sandy soil, why it takes less; and this is standard procedure for determining what type of soil we have and whether it is acceptable for septic tanks.

Q Now was this information furnished to you by the developer of Flint Ridge prior to the time that you approved the plat?

A Yes, sir, it was.

Q For Flint Ridge?

A Yes, sir.

Q Now how many percolation tests does the record show that was made on the Flint Ridge property prior to the time that you approved it?

A I believe it was fifty. I am not sure on that. It was fifty and then we had twenty. I'd have to check the dates on [451] these, just how they fall in here. I

believe it would be a total of seventy then on the whole thing.

Q So there has actually been seventy percolation tests made on it?

A Made on it, right. I'd assert that there have been seventy percolation tests made.

Q And that's on the twenty-two hundred acres which is presently platted, is that correct?

A This is mostly – this is Delaware County where we approved Delaware County.

Q I hand you what has been identified as Defendant Flint Ridge's Exhibit 3. Would you tell the Court what that is, please, sir?

A This is just a plat of the Delaware County Flint Ridge Addition.

Q Does that show where the percolation tests were made?

A Yes, sir. It has little round symbols throughout.

Q Would you show those to the Court so that when the Court looks at the exhibit that he will know what they are?

A For example, here's No. 49 here. Here is where the engineer reports where the percolation –

THE COURT: The two dots, round dots about the size of the rubber end of a penny pencil.

THE WITNESS: There they are.

THE COURT: It's not as large as the rubber end of a [452] pencil, the ordinary pencil; just the old penny type pencil.

All right. I see it. There are two of these, are there?

* * *

Q Now then, handing you what has been marked as Defendant Flint Ridge's Exhibit No. 2, ask you to state what that is.

A This is the percolation test result for sixteen individual lots, and these sixteen individual lots have septic tanks and tile fields already installed, and this is the individual percolation tests done on each one of these lots, sheet number one, and then the next sheet will be the inspection performed by Mr. Dorwin Haggard, the County Sanitarian.

[453] Q Is Mr. Dorwin Haggard here?

A Yes, sir.

Q Now then, so that the Court will understand this, prior to the time that you approved the plat there were some fifty percolation tests made of the entire area, is that correct?

A That's right.

Q Then as I understand your testimony, based upon those percolation tests, the State Department of Health approved the Flint Ridge plat for the installation of septic tanks?

A Yes, sir. Our representative there, Mr. Dorwin Haggard, took this information and the way the engineer, Holway, put it on the map and the result of the percolation tests and he said, "Well, this is an acceptable number of percolation tests to give us an idea."

And of course we approved on the basis of the fact that we come back and do individual percolation tests, as set out here on each lot, and approve each sewer system in the development.

Q That's what I was getting at.

A Right.

Q Prior to the time that a septic tank is actually constructed upon an individual lot in the Flint Ridge subdivision, it is a requirement of the State Department of Health that at least two more percolation tests be

made of the lot to make certain that the lot itself upon which a septic tank is to be [454] located conforms to the requirements of the State Department of Health with respect to the septic tank system?

A That's right.

Q Now then, if in any given lot the percolation test would show that it did not meet the requirements of the State Department of Health, what would be done so far as your Department is concerned?

A Well, we could take for example, first of all, that the soil won't absorb one inch of water in sixty minutes, then we could not approve that lot for a sewage disposal system because the soil is just so tight that it won't absorb water fast enough, as fast as a homeowner could use it, and that would be in a case where there is real tight clay soil; and we have to turn a lot of them down on that.

And in some cases the terrain is so steep that it is impossible to even get equipment on there to, you know, dig the trenches and install them, so in cases like that we have to – they put us in a position of not being able to approve the system and have to use that lot for some other purpose.

Q So in addition to that, does the septic tank field have to be designed for the particular lot involved?

A Yes, sir.

Q And that also has to be approved by the State Department of Health?

A Right.

[455] Q And those functions are carried on through the local sanitarian?

A Right.

Q Now then, in the Defendant's Exhibit No. 2 you state that there are presently sixteen lots in the Flint

Ridge subdivision which have septic tanks installed on them.

A Yes, sir.

Q And the Defendant's Exhibit 2 are reports given to your office showing installation of the septic tanks?

A Yes, sir.

Q Mr. Armstrong, in your opinion, based on your experience, are the soil conditions which exist at the Flint Ridge project, suitable for the installation of septic tanks?

A Yes, sir. All sixteen that we have approved indicated so.

Q In your opinion, will any of the effluent from the septic tank flow into the Illinois River?

A Any of the septic tanks which we have approved, the possibility would be very, very remote. Any septic tanks that we inspect and approve, it would be very remote because we are out there on the site, we see the ground, we see the type of soil. They dig those septic holes approximately six feet deep, because the tank itself is five foot, and we can see what type of soil they are putting it into besides the percolation tests.

[456] Q In your opinion, are the soil conditions out there such as will adequately and properly filter the effluent from the septic tanks?

A Yes, sir, I believe so.

* * *

[468] By Mr. Thieman:

Q Would you state your name to the Court, please?

A Dorwin Lee Hagard.

Q And where do you live, Mr. Hagard?

A I live approximately twelve miles west of Jay, Oklahoma.

Q What is your business or profession?

[469] A I am a Registered Professional Sanitarian, employed by Delaware County Health Department, and I am a representative of the State Health Department.

Q And how long have you been with the State Department of Health?

A Eight years.

Q How long have you been in Delaware County in that capacity?

A Four years.

Q And what are the nature of your duties with respect to septic tank installations?

A We require, we require – go over the percolation tests that are required by the State Department of Health. We require percolation tests be submitted to the local office before a system can be put in, and we also do final inspection work.

Q Would you tell the Court what your final inspection work consists of?

A The final inspection work consists of checking the tank, proper size of the septic tank in relation to what was shown on the perc test.

It also would involve checking to see that the proper footage of secondary tile field was put in, and also you would be checking to see that the tile field was put in at proper depth and on grain.

Q Now then, in connection with your duties, have you [470] inspected the septic installations which have been made to date on the Flint Ridge project?

A Yes, sir, I have.

Q And how many of those have been done?

A Sixteen.

Q And did you personally supervise and inspect those installations?

A Yes, sir.

Q And did they conform to the requirements of the Oklahoma State Department of Health?

A Yes, sir.

Q I hand you Exhibit No. 2 and ask you if those are the reports that were prepared in connection with those installations that you have supervised on the Flint Ridge project?

A These were reports that were submitted to my office and approved by my office, and also the final inspection reports attached on the back that have been made on the sixteen waste systems that have been put in there.

Q Mr. Hagard, would you generally describe to the Court the soil conditions in the Flint Ridge project?

A Of these sixteen here, we had a rocky, cherty type soil. There was, I noticed on a few, some clay in some of it but generally it was a rocky type soil.

Q Now then, based on your experience of four years in Delaware County are the soil conditions in Flint Ridge that [471] you have observed thus far to date conducive for the installation of septic tanks?

A Yes, sir.

Q And in your opinion, based upon your experience, does the effluent from these septic tanks adequately filter itself as it goes into the subsoil structures?

A Yes, sir.

Q Have you ever had difficulties to your knowledge of installation of septic tanks that were made in accordance with requirements of the Oklahoma State Department of Health, of ever leaking into the Illinois River?

A No, sir.

Q In your opinion, Mr. Hagard, is there any possibility that raw sewage would ever get into the Illinois River from a septic tank installed in Flint Ridge in the manner as shown in Defendant's Exhibit No. 2?

A No, sir.

* * *

[475] By Mr. Thieman:

Q Will you state your name to the Court, please?

A William N. Holway.

Q Where do you live, Mr. Holway?

A Tulsa.

Q What is your business or profession?

A I am president of W.R. Holway & Associates, Inc., consulting engineers.

Q And what is the business of W.R. Holway & Associates, engineers?

[476] A We do consulting engineering work primarily for water supply, hydroelectric work, sewage work primarily, architecture, mechanical and so forth.

Q What is your education?

A I have a Bachelor of Science degree from the Massachusetts Institute of Technology in Civil with option in Sanitarian Hydrology.

Q Is that the Massachusetts Institute of Technology which is commonly known as M.I.T.?

A Yes, sir.

Q When did you graduate from M.I.T.?

A 1943.

Q What did you do after graduation in 1943?

A Went with the Navy for three years as a naval architect during World War II.

Q And after your Navy experience, what has been your business?

A I came back from the Navy, I joined the firm and have been with it ever since.

Q Now then, can you give the Court a resume of some of the clients and works that you and your firm have done?

A Our primary clients over the years, we have been engineers for the Grand River Dam Authority since 1938.

Q Did you have any participation in the construction and building of the Grand River Dam?

* * *

[490] Q Okay. If the average was say 1,100 to 1,200 square feet, have you figured out what the percentage of ground coverage of the lot by the home would be?

A I took a 1,200 square foot, which would be a roof on about a 1,000 square foot house, figured one on each lot, yes, sir.

Q Okay. What percentage of the total ground area would be covered by homes?

A 1.3.

Q 1.3 what?

A Percent.

Q Of the total area?

A Of the total area, Phase 1.

Q So 1.4 percent would be burdened by roads; 1.3 percent would be covered by houses?

A Yes, sir.

Q So roughly, 2.7 percent of the entire ground area would be covered by improvements?

A That's true.

Q Now then, Mr. Holway, in connection with the development, did you make studies with respect to determination of the manner of sanitary sewage disposal for the Flint Ridge project?

A Yes, we did.

[491] Q Will you tell the Court what you did in that regard?

A Well, we studied the topography. We computed what the cost of sewers would be but for, again, residential lots, we think that septic tank disposal is the best.

Q And what information, what did you do to arrive at that conclusion?

A Well, we did several things. We did confer with the State Department of Health and advised them of our planned lot size and later we made the fifty percolation tests to show the ground was generally suitable.

We tried to spread those out one for every forty acres, and presented those with our plat to the Health Department.

Q Did you make any core tests?

A We made core tests in relation to the dam.

Q How many core tests did you take?

A In Phase 1 we would have six in that area.

Q Would you tell the Court what a core test is?

A The basic thing we were looking for was formation to build a dam in, in that case. They were all water tested for tightness.

Q And how deep were these core tests?

A They went from the top of the abutment where the dam would be, to well below where the foundation is.

Q Approximately what depth was that?

A Oh, some of them were 90 to 100 feet deep.

[492] Q Did you encounter much subterranean water in this area in connection with those core tests?

A No.

Q Are you familiar with the soil conditions in the area?

A Yes, sir. We worked in this general area for all my life.

Q And would you tell the Court what are the soil conditions based upon your experience and examination, your core tests, your percolation tests and your background?

A Well, in this general area of Oklahoma, if you look hard enough you can find almost anything, but what we call the Boone chert, which is a brown-white flinty rock soil, is generally a broken, brittle rock that's bedded in clay.

Clay will run anywhere from, oh, twenty to sixty or seventy percent, depending on where you are. It's a material that makes an excellent road because it has both rock and binder in it, makes the best dam building material in the world. We have used it extensively.

So I would say that a general classification would be a clay rock soil.

It can be excavated with machinery – in this particular job, the tops of the ridges can be excavated by machinery the depth of the water line which is three feet; and when you get off of the ridges, say a hundred feet down, you have to start shooting it. It gets denser as you go down.

[493] Q What do you mean that it gets denser as you go down?

A The rock gets more solid as you go down. When you get to the bottom of the formation it is extremely solid.

Q Is this type of material conducive for filtration of septic tank effluent?

A In my opinion, I think it's about as good as you can get anywhere.

Q In this area do you find that the consistency of the conditions change rather rapidly from place to place?

A Yes, they can. You can run into where an old tree stump was that might be solid clay, which would not be suitable for a septic tank. You can run into some places that are pretty near solid rock.

Q And do these differences occur within relatively short distances?

A They can, yes, sir.

Q And within a given building site, say on a one and a half acre lot, is it possible that maybe one part of the lot would be suitable for a septic tank and maybe another part would not be?

A That's true. In fact, of some of these sixteen we had to move the field from where we first had planned it.

Q Now then–

MR. IKARD: (Interposing) Your Honor, I didn't hear the answer to that question.

[494] A (The Witness) The sixteen that Mr. Armstrong testified had already been placed, we did the percolation tests and made up the plan of those septic tank systems and we did have to move around a little in some of those lots to get a suitable spot.

Q (By Mr. Thieman) Now then, Mr. Holway, will you explain to the Court what a septic tank is and how it operates?

A A septic system is a system that first you put all of the raw sewage into a tank. The tank's function is to separate out the solid material from the liquid material.

Tanks are equipped with baffles and weirs that skim the fluid off of the top. The fluid then runs into a, what we call a tile absorption field, which consists of an 18 or 24 inch wide trench with four inch tile in it, which is ceramic tile about a foot long and four inches in diameter, and those are laid end to end for the required distance. The tops are covered with tar paper and these are laid on a bed of gravel, surrounded with gravel, in accordance with the Health Department.

Now the liquid disperses itself along that field. The average length of field in those that we have done here is somewhere around 300 feet per house, and the fluid disperses itself through the cracks in the tile, between the tile, into the rock where it is filtered, and then out into the soil.

Q Okay. What happens to the effluent as it is discharged [495] from the tank out into one of these lateral fields?

A It is dispersed into the rock that surrounds the –

Q Does any evaporating take place?

A Oh, yes.

Q How are the impurities which are in the liquid that comes out of the septic tank removed or disposed of, if they ever are?

A The nutrients, the decomposables, are absorbed by bacteria that exist in the rocks and in the soil around there.

It is the same process that we use in what we call a standard rate cycling plant that we build in cities. We spray the fluid on a rock bed, and the bacteria form on the rock bed and eat up the nutrients.

Q Now is that the reason for the gravel around the laterals?

A That's to get more dispersement, and in some soils you really won't need it, but it is to give more area for the fluid to disperse in.

Q And is the bacteria that is formed on the rocks which is located around the tile, do they consume the impurities that are in the effluent?

A Yes, they do.

Q Now then, does plant life grow above a septic tank system?

A Yes. You can tell where they are.

[496] Q And what causes that, Mr. Holway?

A That's the nitrogen and of course the amount of water that's in that area. Johnson grass, particularly, likes to grow on a septic tank field.

Q Does the plant life that is located on top of the septic tank field consume the nitrogen?

A Yes.

Q That is caused by the effluent?

A Part of it, yes, sir.

Q Now then, Mr. Holway, as a result of your background and training and experience in this area, do you have an opinion as to whether or not septic tanks built and constructed on the Flint Ridge project, in accordance with the requirements of the State Department of Health, will ever flow into the Illinois River in a harmful form?

A It is my opinion they will not.

Q Is there any possibility that raw sewage could ever flow into the Illinois River from septic tanks installed in accordance with the requirements of the State Department of Health?

A No, sir, not raw sewage, because you automatically take out the solids when it goes through the tank.

Q With respect to the home sites which may be located nearest the Illinois River, what is the distance that effluent would have to travel in order to be able even to reach the river at its nearest point?

[497] A The nearest one would have to travel 300 feet.

Q Mr. Holway, do you personally own any property in this area?

A I own a location on Grand Lake thirty miles north of here, yes, sir.

Q Are the soil conditions in that particular location the same or approximately the same as they are in the Flint Ridge project?

A It's identical formation, yes, sir.

Q Do you have a water well at that place?

A Yes, sir.

Q Do you have a septic tank?

A Yes, sir.

Q How long have you owned that property?

A They built the house, finished it in 1948.

Q Been in continuous use since that time?

A Pretty much so, yes, sir.

Q Does the water well that you have at your property furnish the water that you drink and that you use at your cabin?

A Yes.

Q Do you test that water?

A Yes, occasionally.

Q How far is the well from the septic tank?

A Oh, I'd estimate 300 feet.

Q How often do you have your well checked?

[498] A Usually in a drought time when it's down. It does have quite a bit of mineral in the well water. We get a little worried about that; we have it checked.

Q Have you ever, since 1948, ever as a result of the tests that you have made in that well of water, ever discovered any of the nutrients or adverse effect from your septic tank?

A No, sir.

Q What do you attribute that to, Mr. Holway?

A I don't think there's any way that the effluent from the septic tank can get into the well, except after it has been well treated, if at all. I doubt if it goes in at all.

* * *

[500] Q But methods have been taken and will be taken to control that as soon as the roads are built, is that right?

A Yes, sir.

Q Mr. Holway, did the State Department of Health approve the plat of Flint Ridge No. 1?

A Yes, sir.

Q And that was a requirement of the laws of the State of Oklahoma?

A Yes, has to be signed by the County Sanitarian.

Q They have to approve the sanitary sewage dispoal system?

A That's true.

Q That's the reason for the plat?

A Yes, sir.

Q And that was done?

A Yes, sir.

* * *

Q Mr. Holway, you testified to extensive studies that you have made and extensive plans that you have engaged in on behalf of the Flint Ridge Development.

In that regard, I'd like to ask you, have you received any federal monies for these services that you have provided for Flint Ridge Development?

[501] A No, sir.

Q Additionally, has the Office of Interstate Land Sales in any way told you how to plan this development?

A No, sir, they have not.

* * *

Q Mr. Holway, as I understand your testimony, you are here today to tell the Court about the plat and generally the sewage system and some of the road construction work, the general plan, is that correct?

A That's correct.

Q As I understand your testimony, you are not offering any opinion one way or another concerning any peripheral development outside of Flint Ridge?

A No, sir.

Q Any effect that it may have on surrounding communities, the effect it may have on school systems in the area?

A No, sir.

Q Health facilities in the area?

A No, sir.

Q The road facilities in the area outside this development?

A No, sir.

Q I take it your testimony is not directed to any impact [502] with respect to the fish life or wildlife habitat or anything like that?

* * *

[503] Q There is a colored map, I believe.

Now refer to your map up here, which is Exhibit 4. The area that comprises Flint Ridge 1 is what, a little darker shaded in proportion; right?

A Yes, sir.

Q And about what portion of the total area that is defined as the Flint Ridge area is that?

A The total shown on that map is 7,069 acres, of which the platted is 2,035, and so it's a little less than a third.

Q Are there going to be roads in the balance of the approximately 5,000 acres?

A Yes, if it is developed as we have developed the other. This is not – we have made a master plan and done some platting, rough platting in this area. Of course it's not fixed. We assume it will be.

SUPREME COURT OF THE UNITED STATES

No. 75-510

Flint Ridge Development Company,

Petitioner,

v.

The Scenic Rivers Association of Oklahoma, et al.

ORDER ALLOWING CERTIORARI. Filed December 8, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 75-545 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 75-545

Carla A. Hills, etc., et al.,

Petitioners,

v.

The Scenic Rivers Association of Oklahoma, et al.

ORDER ALLOWING CERTIORARI. Filed December 8, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 75-510 and a total of one hour is allotted for oral argument.

Supreme Court, U. S.
FILED
NOV 17 1975

No. 75-510

In the Supreme Court of the United States

OCTOBER TERM, 1975

FLINT RIDGE DEVELOPMENT COMPANY,
Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

ANSWER TO PETITION OF FLINT RIDGE DEVELOPMENT COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANDREW T. DALTON, Jr.
2536 East 51st Street
Tulsa, Oklahoma 74105

JAMES N. KHOURIE
2626 East 21st Street
Tulsa, Oklahoma 74114

Counsel for Respondents

C-L Cone-Lewis Printing Co. • 323 E. 3rd • Tulsa, Okla. 74120 • Phone (918) 582-1234

INDEX

Page

Jurisdiction 1

Questions Presented 2

Statement of the Case 4

Summary of Argument 8

Reasons for Denying the Writ:

1. *The District Court and the Court of Appeals correctly ruled that NEPA applies to all federal actions which have a reasonably substantial relationship to the quality of the human environment, whether that action consists of direct federal impact on the environment, or actions taken by other persons which will have a substantial environmental impact, and for which federal permission is required, or which sets into motion the environmental degradation.* 9

2. *Since compliance with N.E.P.A. by HUD, as the administering agency under ILSA, is not prohibited by statute nor impossible, then the decisions of the courts below are correct in all respects.* 10

3. *The Petition for Writ of Certiorari should be denied because the effect on the environment is substantial thereby making the action in this case major federal action.* 19

4. *There are no grounds to grant the petition for Writ of Certiorari.* 20

5. *There is no evidence to support any consideration that there will be wide impact from the decision or that the industry involved will be unable, together with HUD, to comply with the National Environmental Policy Act.* 20

Page

Conclusion 22
Appendix A 1a
Appendix B 3a
Appendix C 19a
Appendix D 31a
Appendix E 35a
Appendix F 44a

CITATIONS

Cases:

Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.
(1975) ___ U.S. ___,
45 L.Ed.2d 191 .....11, 12, 18, 19

Calvert Cliffs Coordinating Committee v. A.E.C.
(C.A.D.C., 1971) 449 F.2d 1109 .....10, 13, 14

Chelsea Neighborhood Association v. U.S. Postal Service (D.C. N.Y. 1975) ___ F. Supp. ___,
7 ERC 1707 10

Davis v. Morton (C.A. 10, 1972) 469 F.2d 593 ..10, 20

Ely v. Velde (C.A. 4, 1971) 451 F.2d 1130 10

Minnesota Public Interest Research Group v. Butz
(C.A. 8, 1974) 498 F.2d 1314 .....10, 19

National Forest Preservation Group v. Butz
(C.A. 9, 1973) 485 F.2d 408 .....10, 19, 20

National Helium Corp. v. Morton
(C.A. 10, 1971) 455 F.2d 650 10

N.R.D.C. v. S.E.C.
(D.C.D.C., 1974) 389 F. Supp. 689 .....14, 15

Page

Rucker v. Willis
(C.A. 4, 1973) 484 F.2d 158 12

S.C.R.A.P. v. U.S. (1973) 412 U.S. 669 11

Simmans v. Grant
(S.D. Tex., 1974) 370 F. Supp. 5 .....10, 20

Scientists Institute for Public Information, Inc. v. A.E.C. (C.A.D.C. 1973) 481 F.2d 1079 .....10, 20

Smith v. U.S. (C.A. 9, 1959)
272 F.2d 288, cert. den. 362 U.S. 954 2

Wyoming Outdoor Coordinating Council v. Butz
(C.A. 10, 1973) 484 F.2d 1244 .....10, 12, 20

Statutes and regulations:

15 U.S.C. § 1705(12) 5, 18, 44a
15 U.S.C. § 1706 .....5, 44a-46a
15 U.S.C. § 1706(a)(d) 5, 18, 44a
15 U.S.C. § 1707(a) 5, 18,46a
HUD Handbook 1390.1, 38 FR 19182 (July 18, 1973), amend. 39 FR 38922 (Nov. 4, 1974) ...3a-18a
HUD Department Handbook 1390.1, Chapter 1, Part 2(i), 38 F.R. 19182 .....4, 5
Handbook 1390.1, 38 FR 19182, July 18, 1973, 39 FR 38922 Nov. 4, 1974 .....17, 3a-18a
National Environmental Policy Act of 1969, Section 102(2)(C) 16
H.U.D. Proposed Rules, Section 50.3(i) 5
Rule 19 of the Rules of the United States Supreme Court 9, 20

Page

Securities and Exchange Act of 1933,
15 U.S.C. § 77a et seq. 15

Securities and Exchange Act of 1933,
15 U.S.C. § 77h 15

24 C.F.R. 1700.80 .....5, 31a-34a

24 C.F.R. 1700.80(a)(b)(c) 5, 18, 31a-34a

24 C.F.R. 1710.45 .....5, 31a-34a

24 C.F.R. 1710.105 .....5, 16, 18, 31a-34a

24 C.F.R. 1710.110 .....5, 16, 31a-34a

Miscellaneous:

Fifth Annual Report of the Council on Environmental Quality 35a-43a

Joint Senate Oversight Hearings, 92nd Cong.
2nd Session, Ser. No. 92-H-32 (1972) p. 455-6.... 13

No. 75-510

In the Supreme Court of the United States

OCTOBER TERM, 1975

FLINT RIDGE DEVELOPMENT COMPANY,
Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

ANSWER TO PETITION OF FLINT RIDGE DEVELOPMENT COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondents, The Scenic Rivers Association of Oklahoma and the Illinois River Conservation Council, respectfully pray that this Court deny the Petitioner's request for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

I

JURISDICTION

Respondents deny that this Court has jurisdiction.

On September 6, 1974, Flint Ridge Development Company filed its Notice of Appeal (R. p. 711) which

stated as follows:

> "Notice is hereby given that Flint Ridge Development Company, Intervening Defendant in the above entitled case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from an Order issuing a preliminary injunction restraining the Intervening Defendant from either selling or developing its property located in Delaware County, Oklahoma, known as "Flint Ridge" pending the preparation and filing of an Environmental Impact Study by the Defendants, James T. Lynn, Secretary of Housing and Urban Development, and George K. Bertstein, Administrator of the Office of Interstate Land Sales Registration, said Order being entered on the 4th day of September, 1974."

No such order exists as referred to in the Notice of Appeal; and, therefore, there is no jurisdiction on review. *Smith v. U.S.* (CA 9, 1959) 272 F.2d 288, cert. den. 362 U.S. 954.

II
QUESTIONS PRESENTED

Respondents disagree with the "Questions Presented" set forth in the Petitioner's Petition for Writ of Certiorari.

1. Respondents do not agree that the Department of Housing and Urban Development's authority is "limited to checking to determine whether the statement appears to be complete and accurate on its face." As shown herein, the Department has authority to require disclosures not only for the protection of the purchaser

but also for the protection of the public interest. The Department has strong regulatory and policing powers in connection with the Interstate Land Sales Act.

2. Respondents disagree with the second question presented by Petitioner in that there is no absolute requirement under the Interstate Land Sales Act that a registration statement become effective 30 days after filing. In the first place there are no facts to support this conclusion in the record. The facts are to the contrary because the Statement of Record and Property Report submitted initially by Flint Ridge Development Company was in fact suspended for a period of approximately 90 days. Finally the issue fails to disclose the possibilities for being innovative which are available to the Department of Housing and Urban Development (HUD) and which are required under the National Environmental Policy Act (NEPA).

Therefore, Respondents submit that the issues presented to the Trial Court and to the Circuit Court of Appeals, and which were addressed and ruled upon by these respective courts, are as follows:

(1) Whether *under the facts* of the case—facts which conclusively demonstrate significant actual and potential environmental degradation—the Department of Housing and Urban Development must comply with the National Environmental Policy Act and prepare an environmental impact statement.

(2) Whether HUD is exempt from the standards and mandates of NEPA.

(3) Whether HUD is bound by its own rules, policies and procedures.

III
STATEMENT OF THE CASE

Respondents submit that the Statement of the Case is inaccurate and incomplete in several respects. Paragraph 1, in which the Petitioner says that the Secretary of Housing and Urban Development made a "determination" is incorrect. In response to a request by the President of the Illinois River Conservation Council a letter was received from Mr. Meeker, a copy of which is reproduced as Appendix A.

HUD at that time still had no rules with respect to protection and enhancement of the environment as required by the National Environmental Policy Act but was operating under what they refer to as Department Handbook 1390.1. Pertinent portions of the Handbook are reproduced as Appendix B. It provides in part:

> "Finding of inapplicability (negative statement). A determination by an authorized HUD official under the authority of the HUD Guidelines approved by CEQ which are issued in accordance with the CEQ Guidelines implementing HEPA, that no Environmental Impact Statement is required for the proposed HUD action under consideration. The

> Finding of Inapplicability for project level actions is a part of the Special Environmental Clearance. The format for the Finding of Inapplicability for policy actions is set forth in Appendix F."

The Handbook provides that determinations are made as part of the special environmental clearance procedures and under certain formats more particularly specified in the Handbook. Handbook 1390.1, Chapter 1, Part 2(i), 38 F.R. 19182. Section 50.3(i) of the Proposed Rules reiterates the provisions of the Handbook.

The next inaccuracy is the assertion that the Statement of Record filed under the Interstate Land Sales Act (ILSA) "automatically" becomes effective 30 days after filing. This is factually inaccurate in this situation before the Court; and, further, does not conform with the Statute inasmuch as the Secretary has wide discretion to suspend before the 30 days. Nor must the Statement of Record appear to be fraudulent to be suspended under either the Statute or HUD rules. 15 U.S.C. §§ 1705 (12), 1706(a)(d), 1707(a). See also 24 CFR. 1700.80, 1710.45, 1710.105 and 1710.110.

In fact § 1706(d), the citation referred to by the Petitioner, specifically provides that the Secretary may suspend for omission any material fact required to be stated. Under Section 1706(b) of the Interstate Land Sales Act, the Secretary has the authority to suspend until "such additional information as the Secretary shall

require" be provided. The Secretary under that section is authorized to suspend when the Statement of Record is "incomplete or inaccurate in any material respect".

On p. 4 of the Petition in the next to last paragraph the Petitioner suggests that much occurred prior to the filing under the Interstate Land Sales Act. It should be noted that only a minor portion of the activities were underway prior to the filing. In fact the Petitioner owned 7,000 acres and only a portion thereof was being developed under a phase development procedure. Secondly, the developer had another 14,000 acres under option. Finally, much of the roads, the water supply and all of the construction activities and other forms of problems that would occur in the future were yet to be realized and would not be realized until such time as the sales had occurred and other people had become involved. (See Transcript, R. 489, 503, 504, 518).

Flint Ridge dismisses contemptuously the real facts of this case by a footnote on p. 5. *Significantly, the Findings of Fact supporting the environmental degradation are not appealed from nor seriously challenged by Flint Ridge or by the Government in this case.* Thus, it is important to bear in mind that the Trial Court found as a matter of fact that the development will, actually or potentially, result in the total destruction of the Illinois River Basin. The facts as adduced at trial clearly reveal

both actual and potential substantial effects on the quality of the human environment. That there will be substantial impact on the environment has *never* been controverted on appeal and as an issue before this Court remains uncontroverted.

The river involved is a scenic river both in fact and in law. It has been designated for study for inclusion into the National Wild and Scenic Rivers System and is a State designated scenic river (Finding No. 10 of the Trial Court, R. p. 689). See also Findings of Fact and Law generally, R. p. 689 and following.

These Findings establish that the effects of the development include effects on the depth and course of the river, its tributaries, drainage area, the plant life, the wildlife habitats, fish and wildlife, soils, air, esthetics of the area and upon the socio-economic conditions of the area, including such matters as health, hospital care facilities, roads and highways, schools, and police and fire protection.

In summary this is a situation in which the Federal Defendant has absolutely refused to comply with the National Environmental Policy Act (a "serious dereliction of duty," Finding No. 13, R. p. 689). As a result of that refusal, the Government has created a situation in which, as a result of development on the river, there is actual and potential threat of total environmental

degradation to this river and to this vital public resource.

The Respondents therefore respectfully submit the following argument and authorities in opposition to the Petition of Flint Ridge Development Company for a Writ of Certiorari.

IV
SUMMARY OF ARGUMENT

1. HUD must comply with the mandates of NEPA whenever its action, or action it permits other parties to take, causes or induces a significant effect on the quality of the human environment.

2. ILSA neither prohibits nor makes compliance with NEPA impossible.

Superimposed upon the grant of authority to HUD to regulate interstate land sales is a Congressional mandate contained in NEPA and this gives specific content to HUD's authority under ILSA to require disclosure of environmental information in the public interest in the form of an environmental impact statement. ILSA and NEPA are full disclosure statutes which complement each other.

3. It does not foster the purposes of NEPA or make any sense to find federal action minor when the environmental effects of agency action, or action it permits private parties to take, is substantial.

Major federal action is a mixed question of law and

fact. One test for major federal action is whether, as a result of federal action, a private party is permitted to undertake environmental degradation; and, if so, such action is major.

4. Petitioner has failed to promote any of the considerations contained in Rule 19 of the Rules of the United States Supreme Court.

5. For the first time on appeal Petitioner raises the issue of effect upon the industry as a whole.

There is no evidence in the record to support this argument and it was not raised in the Courts below. Nevertheless, there is no major affect upon the industry as a whole. In any event such an issue is one more properly presented to Congress than to the Court.

V
REASONS FOR DENYING THE WRIT

1. The District Court and the Court of Appeals correctly ruled that NEPA applies to all federal actions which have a reasonably substantial relationship to the quality of the human environment, whether that action consists of direct federal impact on the environment, or actions taken by other persons which will have a substantial environmental impact, and for which federal permission is required, or which sets into motion the environmental degradation.

The Federal Courts unanimously agree that the Federal Government under NEPA is required to prepare adquate environmental information bases before it acts however slight its role. *Calvert Cliffs Coordinating Committee v. A.E.C.* (C.A.D.C., 1971) 449 F.2d 1109; *Minnesota Public Interest Research Group v. Butz* (C.A., 8, 1974) 498 F.2d 1314; *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408; *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244; *Davis v. Morton* (C.A. 10, 1972) 469 F.2d 593; *National Helium Corp. v. Morton* (C.A. 10, 1971) 455 F.2d 650; *Scientists Institute for Public Information, Inc. v. A.E.C.* (C.A.D.C. 1973) 481 F.2d 1079; *Simmans v. Grant* (S.D. Tex., 1974) 370 F. Supp. 5; and *Ely v. Velde* (C.A. 4, 1971) 451 F.2d 1130; *Chelsea Neighborhood Association v. U.S. Postal Service* (D.C. N.Y. 1975) ___ F. Supp. ___, 7 ERC 1707. Flint Ridge's argument completely ignores the second portion of the test set forth in the National Environmental Policy Act. Simply stated, that is that when there is a significant effect, a matter of fact which is unappealed from, Federal action, by its very nature, becomes major.

2. Since compliance with N.E.P.A. by HUD, as the administering agency under ILSA, is not prohibited by statute nor impossible, then the decisions of the courts below are correct in all respects.

Flint Ridge argues that by requiring an environmental impact statement of HUD for a project on the Illinois River, the decisions of the lower courts frustrate the scheme of ILSA and conflict with existing case law. As the Tenth Circuit stated in its opinion, "we regard this as superficial." Petitioner relies on a nonexistent holding in *S.C.R.A.P. v. U.S.* (1973) 412 U.S. 669 to support its claim that by ordering HUD to comply with NEPA the Courts have in effect repealed or amended ILSA. This is nonsense.

The issue in *S.C.R.A.P.* I was not whether there was general judicial power in a Federal District Court to determine if a Federal agency has complied with NEPA and to grant equitable relief if it has not, but rather whether, "in a specific context NEPA sub silentio *revived judicial powers* that have been explicitly eliminated by Congress" 412 U.S. 669, 696 (emphasis added).

S.C.R.A.P. I dealt with a unique situation concerning a specific statute which restricted the power of the Federal Courts to grant injunctions, and not the general applicability of NEPA to actions by Federal agencies which have impact on the environment or permit private parties to take action which will have an impact. In the context of the case Petitioners ask this Court to review, *S.C.R.A.P.* I is totally irrelevant.

The second *S.C.R.A.P.* case is *Aberdeen and Rock-*

fish Railroad Co. v. S.C.R.A.P. (1975)____ U.S. ____, 45 L.Ed.2d 191. Implicit in this Court's review of the sufficiency of the ICC's compliance with NEPA is this Court's recognition of the applicability of NEPA to even the ICC.

This Court also stated that the unique procedure of a general revenue proceeding under ICC was major federal action thereby requiring compliance with NEPA so long as the proceeding had a substantial effect upon the environment. This instructs us that the matter of Federal action and effect upon the environment are intertwined and that there are not really two tests but a mixed test. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158 and *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244.

Under the facts of this case, again facts which are unappealed from, there is clear actual and potential substantial effect on the environment. As this Court stated, "NEPA does create a discreet (*sic*) procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal action and a right of action in an adversely affected party to force that obligation." 45 L.Ed.2d at 215.

The argument with respect to operational conflict, between ILSA and NEPA, becomes even more absurd

after even a brief review of the legislative history of NEPA. After extensive debate about the meaning of NEPA's language in Section 102, "to the fullest extent possible," a statement was issued by the Bill's managers in the House which declared that the Act was to be complied with fully unless existing statutory law expressly prohibited full compliance or made it impossible. 115 Cong. Rec. 39703 (Dec. 17, 1969).

The case of *Calvert Cliffs Coordinating Committee v. A.E.C.* (C.A.D.C., 1971) 449 F.2d 1109 has made clear that Congress intended to excuse an agency from compliance *only* where conflicting authority expressly prohibited compliance with NEPA or made it impossible. 449 F.2d 1115, Note 12.

In the Joint Senate Oversight Hearings the correct interpretation of NEPA emerged, i.e. under NEPA the decision-maker must take a hard look at the environmental consequences of the decision and then decide. This Court said the same thing in the *S.C.R.A.P.* II case. Only where an agency would have to disobey a *specific* statutory command in order to apply NEPA would the latter statute give way. In practically every conceivable set of circumstances, including the one here, such a situation does not occur. *Joint Senate Oversight Hearings,* 92nd Cong. 2nd Session, Ser. No. 92-H-32 (1972) pp. 455-6.

The argument of Petitioner that enforcement of NEPA frustrates the statutory scheme of ILSA completely ignores the obvious legislative intent that Federal agencies *must* reconcile conflicts and fashion compromises. The legislative intent, which has been unanimously accepted by all of the Federal Courts, is not to choose *either* to carry out a development mandate *or* to protect the environment. This instance is merely a lame attempt by HUD to escape the duties of NEPA and its own regulations.

The fallacy of the either/or argument was destroyed with finality in *Calvert Cliffs Coordinating Committee v. A.E.C.*, supra.

A recent lucid example is *N.R.D.C. v. S.E.C.* (D.D.D.C., 1974) 389 F. Supp. 689.

> "Superimposed upon this grant to the SEC of broad rulemaking authority is the Congressional mandate to the federal agencies which is contained in NEPA; that is, NEPA gives specific content to the SEC's authority under the securities laws to require disclosure of information 'in the public interest'. As analyzed in *Calvert Cliffs' Coordinating Comm. v. AEC,* 449 F.2d 1109 [2 ERC 1779] (D.C. Cir. 1971), the procedural requirements of NEPA § 102, 42 U.S.C. § 4332, must be carried out 'to the fullest extent possible'. These procedural requirements are, inter alia: (1) that "policies, regulations, and public laws of the United States shall be interpreted and administered' in accordance with NEPA policies; and (2) that 'all agencies of the Federal Government shall— . . . (F) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.' Thus, Congress has directed the SEC and this Court to interpret the securities laws *to the fullest extent possible* in accordance with the overriding Congressional mandate of NEPA to protect and enhance the Nation's environment. Specifically, *Congress* has determined that the dissemination of information to governmental units, institutions, and interested individuals, can aid the purposes of NEPA." (Emp. added)

Petitioner admits that ILSA is patterned after the Securities and Exchange Act of 1933, 15 U.S.C. § 77a et seq.

Under § 1706(a) of ILSA the Statement of Record becomes effective 30 days after filing but the Secretary is required to give due regard to protection of purchasers *and* the public interest in determining the actual effective date.

Under § 77h of the Securities and Exchange Act, the effective date is 20 days after filing. Notwithstanding the so-called "automatic" effective dates, the Court in *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp 689, stated in effect that the S.E.C. had to comply with NEPA.

That S.E.C. has accepted this ruling is disclosed by the fact that the S.E.C. has failed to appeal therefrom

and is now or has conducted public hearings to bring its procedures into compliance with NEPA.

In spite of HUD's statement that disclosure filings under ILSA are not Federal actions for the purposes of NEPA (see Appendix A) Flint Ridge *admits* that NEPA applies to interstate land sales on p. 17 of its Petition.

HUD's refrain throughout this protracted evasion of its duties under NEPA is that it made no recommendation or report on proposals for legislation, but it does NOT DENY THAT it *took action* (permitting an interstate land sales filing to become effective) and cannot now challenge a finding of fact that this led to a substantial adverse effect on the quality of the human environment. Nor can HUD ignore that Section 102(2)(C) of NEPA includes such action, and in fact HUD admits that its own regulations, 24C.F.R. 1710.105 and 1710.110, require some disclosure of environmental information. The incredible and destructive irony of HUD's attitude is reflected by its letter of March 7, 1974, in which the administrator of the OILSR said:

> "In July, 1973, Secretary Lynn promulgated policy contained in 1390.1, A Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality. Disclosure filings required by the Interstate Land Sales Full Disclosure Act are not considered federal actions for purposes of compliance with the National Environmental Policy Act and implementing regulations."

The cold, undisguised truth is that HUD's own handbook gives the lie to its claims. ***HUD has already made a determination that NEPA applies to interstate land sales filings.*** (Handbook 1390.1, 38 FR 19182, July 18, 1973, 39 FR 38922 Nov. 4, 1974).[1]

Further rule making is really not required. HUD has rules and procedures to establish the environmental effects of its decision to declare that Flint Ridge or any other developer has complied with the Interstate Land Sales Act. Petitioner has attacked the decision below on the ground that it converts "any Federal action" into major Federal action. To begin this is similar to a syl-

[1] This Handbook was promulgated in response to NEPA's directive that the Federal Government use all practicable means to implement national environmental policy. One of the main tools for compliance is the EIS. The Handbook sets forth HUD policy and delineates the procedure which all HUD agencies will follow in arriving at the determination as to if and when an EIS is to be prepared. Chapter 2, Part 5(a)(1), of the Handbook lists all HUD activities which are exempt from the requirements of the Handbook. There are three complete exemptions ("an individual action on a one-to-four family dwelling, training grants, individual rehabilitation grants"), and two partial exemptions which concern emergency disaster relief programs. Following the enumerated exemptions is the statement, *"Except for these exemptions, all HUD actions must undergo one or more environmental clearances."* OILSR activities, therefore, would be included in the category which is subject to the HUD procedure of environmental clearance. That procedure consists of a three-tier review of all actions including individual project actions, legislation, regulations, and all policy documents.

logism with one premise missing because the argument fails to take into consideration the *unappealed* from Findings of Fact that there is major federal action AND SUBSTANTIAL EFFECT ON THE QUALITY OF THE HUMAN ENVIRONMENT. See *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.,* supra, at 45 L.Ed.2d 215.

Second, Petitioner details a number of statutes involving authority to an agency to control or regulate some form of private activity. These statutory provisions are no different than the control of interstate land sales given to HUD by ILSA. See, for example 15 U.S.C. § 1705 (12), § 1706 (a) (d), § 1707 (a), and 24 C.F.R. 1710.105. In fact, it is even a crime to sell without HUD approval under the Interstate Land Sales Act.

The relevant regulation, 24 C.F.R. 1700.80(a)(b)(c) is set forth in the Appendix D. These statutes and regulations establish beyond challenge that ILSA gives HUD federal control over, direct involvement in, and power to approve action of private parties which can and does adversely affect the environment. The Circuit Court opinion did in fact deal with organic statutes no different from the organic statute involved here.

Even assuming, although we do not agree, that there is a two-test standard under NEPA, no decided case (including *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.* at p. 215 of 45 L.Ed.2d) has refused to require an EIS when the effects of the so-called minor activity were significant. See e.g., *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314 and *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408.

3. The Petition for Writ of Certiorari should be denied because the effect on the environment is substantial thereby making the action in this case major federal action.

This Court has instructed us in *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.,* supra, that substantial effect upon the environment has a direct relationship to the meaning of the phrase "major federal action." This, of course, is what the lower courts throughout the United States have been saying for some period of time. In *Minnesota Public Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314 the court stated that:

> *"To separate the consideration of the magnitude of Federal action from its impact on the environment does little to foster the purposes of the act,* i.e. to 'attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.' *By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,'* and to hold N.E.P.A. inapplicable to such action. Yet if the action has a significant effect, it is the intent of N.E.P.A. that it should be the

subject of detailed consideration mandated by N.E.P.A.; the activities of Federal agencies cannot be isolated from their impact upon the environment. This approach is more consonant with the purpose of N.E.P.A. as supported in S. Rep. 91-296, supra, and the C.E.Q. Guidelines."

To the same effect see *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244; *Scientists Institute for Public Information, Inc. v. A.E.C.* (C.A.D.C., 1973) 481 F.2d 1079; *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408; *Simmans v. Grant* (S.D. Tex., 1974) 370 F. Supp. 5 and the outright rejection of the argument in *Davis v. Morton* (C.A. 10, 1972) 469 F.2d 593.

4. There are no grounds to grant the petition for Writ of Certiorari.

The Circuit Courts are unanimous. The decision below is in full accord with the pronouncements of this Court. In short, Flint Ridge wholly fails to come within the considerations of Rule 19 of the Rules of the United States Supreme Court.

5. There is no evidence to support any consideration that there will be wide impact from the decision or that the industry involved will be unable, together with HUD, to comply with the National Environmental Policy Act.

The Petitioner, Flint Ridge, on p. 18 makes a significant admission when it states, "Thus, except in the

rare case, where it can be shown that the development will have a significant effect upon the quality of the human environment . . . " This statement alone underscores the need for NEPA compliance.

Notwithstanding the fact that such argument is raised now for the first time before this Court, and further that there is no evidence to support the statement, it is distinctly possible that under the existing HUD guidelines there will, in fact, be no wide impact. To begin, many projects on file with HUD may have been filed prior to the enactment of NEPA or because of their age may be completely developed and sold.

Secondly, other projects may have been abandoned, may be under some form of suspension for economic or other reasons entirely independent of NEPA. In the former instance, it would probably not be necessary to proceed with environmental clearances until such time as it appears that the project will be reinstated. In that latter instance again the agency and the developer is on notice of the existence of the National Environmental Policy Act and could well use the suspension time to bring itself into compliance.

With respect to the remainder of the cases, HUD in its guidelines has a three-tier approach to environmental review. In some instances it may be possible to undertake the environmental review, in good faith, and as a result thereof determine that there would be no significant

effect upon the quality of the human environment. Granted, in some instances it may be necessary to carry the environmental review process to its ultimate conclusion, and that is a full-fledged environmental impact statement. However in those instances where that is necessary, it is in the public interest and in furtherance of the National policy that it be done.[2] Such environmental review would be compatible both with the Interstate Land Sales Act so as to protect purchasers and the public and the National Environmental Policy Act. However, neither Petitioner nor Respondent can advise this Court as to how many projects would require full environmental impact statements.

Petitioner closes with a plea to this Court to reverse the case because of so-called (yet unproven) effects upon the economy. Petitioner apparently feels that the land and our natural resources are not capital and thus free for the taking. Nothing could be further from the truth. Our economy can not risk the burden of failure to com-

[2] Compliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that these costs must be discounted. *Steubing v. Brinegar* (C.A. 2, 1975) 511 F.2d 489 at 497. See also *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422-23 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972); *Calvert Cliffs' Coordinating Comm. v. AEC*, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1122 (1971). Another direct result of NEPA-caused delays that Congress undoubtedly was aware of, is that the jobs created by a construction project might be interrupted and that the initial employment of some persons might be postponed.

ply with environmental considerations.

VI
CONCLUSION

The traditional reasons for this Court to accept a Petition for Writ of Certiorari do not exist. There is absolutely no Court of Appeals decision in conflict with another Court of Appeals on these issues. All cases are consistent in all respects. Nor are the decisions below in conflict with decisions of this Court.

Respondents have shown that the Petitioner has not properly perfected its appeal in the Circuit Court, that there is no conflict, that NEPA has mandatory requirements superimposed upon the developmental mandates of the agencies and that the Federal action involved herein becomes major if for no other reason than because of the substantial affect on the quality of the human environment.

We, therefore, respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Andrew T. Dalton Jr.
2536 E. 51st Street
Tulsa, Oklahoma 74105

James N. Khourie
2626 E. 21st Street
Tulsa, Oklahoma 74114

Counsel for Respondents

APPENDIX A

MAR 7 1974

Mrs. Sherrill Nilson
Chairman, Executive Committee
Illinois River Conservation Council
4214 South Whelling Avenue
Tulsa, Oklahoma 74105

Dear Mrs. Nilson:

Thank you for your letter of February 23, 1974, regarding the Interstate Land Sales Full Disclosure Act and provisions of the National Environmental Policy Act.

The Interstate Land Sales Full Disclosure Act is just that, a disclosure act that requires the disclosure of important facts about the land that are of concern to prospective purchasers. It does not give HUD authority to disapprove land developments as such.

In July 1973, Secretary Lynn promulgated policy contained in 1390.1, A Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality. Disclosure filings required by the Interstate Land Sales Full Disclosure Act are not considered federal actions for purposes of compliance with the National Environmental Policy Act and implementing regulations.

Sincerely,
George K. Bernstein
George K. Bernstein
Interstate Land Sales Administrator

cc: Bernstein 9230
McDowell 9260
Meeker 7100

Broun/Miller	8204		
Farbstein/ Halpern	10240	Heidermann	9262
		Sullivan	9264
Mitchell/ Elliott	10214	OILSR File	
Curry	10270		
Sauerbrunn	10150		
Race	10150		

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URBAN DEVELOPMENT

APPENDIX B

Department of Housing and Urban Development
Procedures for Protection and Enhancement
of Environmental Quality

Dept. Handbook 1390.1, 38 FR 19182 (July 18, 1973), amend. 39 FR 38922 (Nov. 4, 1974)

On October 20, 1972 (37 FR 22673) the Council on Environmental Quality published HUD Circular 1390.1, "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality" implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91-190). Although this Circular was issued as a draft on July 16, 1971, it was made effective immediately, pending issuance of final procedures.

The Department consulted with the Council on Environmental Quality on the procedures and considered comments from interested parties, including numerous Federal agencies. Major changes and improvements have been made, and the revised procedures are now being issued in the form of HUD Handbook 1390.1. "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality." These new procedures will facilitate and promote the Department's implementation of the National Environmental Policy Act of 1969.

On May 2, 1973 (38 FR 10856) the Council on Environmental Quality published proposed revised guidelines on the preparation of environmental impact statements. These proposed guidelines provide that, after they are made effective, each Federal agency shall revise its procedures to respond to requirements imposed by the revised guidelines.

Since the Department's new procedures will substantially improve implementation of its environmental responsibilities and will soon be further revised to comply with the revised CEQ Guidelines, comment and public procedure would be unnecessary and contrary to the public interest and good cause exists for making HUD Handbook 1390.1 effective upon publication.

Interested parties are invited to submit written comments concerning the revised procedures to the Rules Docket Clerk, Office of the General Counsel, Room 10256, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

(Sec. 7(d), Department of HUD Act; 42 U.S.C. 3535(d); sec. 102(2), National Environmental Policy Act of 1969; 42 U.S.C. 4332(2))

JAMES T. LYNN
Secretary of Housing
and Urban Development.

[1390.1]

DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

HUD STAFF

Approved June 11, 1973.

TABLE OF CONTENTS

CHAPTER 1—General Policy and Responsibility

1. Purpose and authority.
2. Terminology.
3. General policy.
4. Office responsibilities for protection and enhancement of environmental quality.

a. Assistant Secretary for Community Planning and Development.
b. General Counsel.
c. Assistant Secretaries and Federal Insurance Administrator.
d. Assistant Secretary for Administration.
e. Regional Administrators.
f. Area Office and Insuring Office Directors.

CHAPTER II—Environmental Clearances

5. Environmental Clearance Policy on HUD Actions.
   a. General.
      (1) Exemptions.
      (2) Additional requirements.
      (3) Controversy.
      (4) Retroactivity.
      (5) Evaluation of comprehensive activities.
      (6) Properties listed on, or nominated to, the National Register of Historic Places.
      (7) Environmental Clearance Forms.
      (8) Relationship between A-95 procedures and environmental clearance procedures.
      (9) Updating environmental clearances.
   b. Normal environmental clearance.
   c. Special environmental clearance.
      (1) Project level actions.
      (2) Policy actions (legislation, regulations, policy and guidance documents).
   d. Environmental impact statement clearance.
6. Public disclosure.

CHAPTER III—Review of Other Agencies Environmental Impact Statements

7. HUD comments on environmental impact statements. Initiated by Other Federal Agencies.

CHAPTER IV—[Reserved]

APPENDICES

A. Proposed HUD actions requiring special environmental clearance or environmental impact statement clearance.
  A-1. Project level actions subject to threshhold criteria.
  A-2. Other HUD actions with special requirements.
B. Environmental decision making process.
  B-1. Initial determination of required environmental clearance.
  B-2. Flowchart of environmental clearance procedures.
C. Environmental clearance forms.
  C-1. Applicant's environmental information (Form ECO-1) and instructions.
  C-2. Normal environmental clearance worksheet (Form ECO-2).
  C-3. Special environmental clearance worksheet (Form ECO-3).
  C-4. Environmental finding resulting from special clearance.
D. Environmental Impact Statement.
  D-1. Outline of content of environmental impact statement for HUD project level actions.
  D-2. Outline of content of environmental impact statement for HUD policy actions.
  D-3. Format for summary sheet of environmental impact statement.
  D-4 Format for cover page of HUD environmental impact statement.
E. Field Responsibilities for environmental clearance.
F. Format for finding of inapplicability for policy actions.

G. Outline of content for HUD comment on environmental impact statements of other agencies.
H. HUD Areas of jurisdiction by law or special expertise.
I. Title I of the National Environmental Policy Act of 1969 (P.L. 91-190). [1]
J. Executive Order 11514, protection and enhancement of environmental quality. [2]
K. Council on environmental quality guidelines on statements on proposed Federal actions affecting the environment. [3]
L. Advisory Council on Historic Preservation, National Register of Historic Places, Protection of Properties; Procedures for Compliance. [4]
M. Executive Order 11593, protection and enhancement of the cultural environment. [5]

DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

CHAPTER I—General Policy and Responsibilities

1 *Purpose and authority.* The National Environment Policy Act of 1969 (P.L. 91-190) establishes new national policy, goals and procedures for protecting and enhancing environmental quality. The act, effective January 1,

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[1] Filed as part of the original document. See 83 Stat. 852, 42 U.S.C. 4321 note.

[2] Filed as part of the original document. See 35 FR 4247, March 7, 1970.

[3] Filed as part of the original document. See 36 FR 7724, April 23, 1971.

[4] Filed as part of the original document. See 37 FR 24146, November 14, 1972.

[5] Filed as part of the original document. See 36 FR 8921, May 15, 1971.

1970, establishes the Council on Environmental Quality to set overall policies to implement the Act.

The National Environmental Policy Act (NEPA) directs the Federal government to use all practicable means, including financial and technical assistance, to implement the national policy. NEPA governs all Federal departments and agencies and requires systematic attention to the environmental consequences of all Federal activities.

The purposes of this Handbook are to set forth departmental environmental policy, to assign responsibilities, and to provide procedural guidance to all headquarters and field offices for environmental clearances under NEPA. The Handbook applies to HUD legislative proposals, policy and guidance documents (including guides, regulations, handbooks, circulars, technical standards, etc.), and individual project approval actions on insurance, loans and grants, subsidies and demonstration projects.

This Handbook is based on authority provided in:

a. The Department of Housing and Urban Development (HUD) Act of 1965 (P.L. 89-174) which provides that the Secretary may make rules and regulations as may be necessary to carry out his functions, powers, and duties, and sets forth, as a matter of national purpose, the sound development of the Nation's communities and metropolitan areas;

b. The National Environmental Policy Act of 1969 (P.L. 91-190) which establishes a comprehensive policy for protection and enhancement of environmental quality by the Federal Government, creates the Council on Environmental Quality (CEQ) in the Executive Office of the President and directs Federal Agencies to carry out the purposes of this Act;

* * *

2. *Terminology*—a. *Environment.* Environment is not defined in NEPA or in the CEQ Guidelines. However, it is clear from section 102 of the Act and elsewhere that the term is meant to be interpreted broadly to include physical, social, cultural, and aesthetic dimensions. Examples of environmental considerations are: air and water quality, erosion control, natural hazards, land use planning, site selection and design, subdivision development, conservation of flora and fauna, urban congestion, overcrowding, displacement and relocation resulting from public or private action or natural disaster, noise pollution, urban blight, code violations and building abandonment, urban sprawl, urban growth policy, preservation of cultural resources, including properties on the National Register of Historic Places, urban design and the quality of the built environment, the impact of the environment on people and their activities.

b. *Major Federal actions significantly affecting the quality of the human environment.* Those actions taken by a Federal agency which require Environmental Impact Statements in accordance with section 102(2)(C) of the National Environmental Policy Act. As HUD processes between 15,000 and 20,000 applications per year at the project level, not including insurance actions on individual houses, the three level environmental clearance process defined in this Handbook shall be used to determine which action is a major Federal action significantly affecting the quality of the human environment.

c. *Significant environmental impact.* For the purposes of this Handbook, the term "significant environmental impact" is used to describe the consequences of an ac-

tion significantly affecting the quality of the human environment. This term is defined to some extent in paragraph 5 of the CEQ Guidelines, but the definition in general is a matter of discretion delegated to agency heads for formulation of guidelines subject to the approval of CEQ.

d. *Environmental impact.* An environmental impact is any alteration of environmental conditions or creation of a new set of environmental conditions, adverse or beneficial, caused or induced by the action or set of actions under consideration. Assessment of the significance of the environmental impact generally involves two major elements: A quantitative measure of magnitude and a qualitative measure of importance. Such a determination is a matter of agency judgment and consensus; at the project level, this judgment shall be governed by HUD environmental policies and standards.

e. *HUD environmental policies and standards:* National, Departmental, and program objectives, policies, standards, and procedures. These include: (1) National environmental goals and policies as expressed in the National Environmental Policy Act, other statutes and Executive Orders listed in paragraph 1 above, and guidelines issued by the Council on Environmental Quality; (2) Department-wide standards and policies such as HUD Circular 1390.2; and (3) environmental considerations contained in program policy and guidance documents, including environment-related project selection criteria, minimum property standards, and environmental elements of program circulars, handbooks and other issuances. Further clarification will be provided with the revision of program policies, procedures, standards and criteria and/or issuance of the consolidated office-wide circulars or handbooks of environmental policies and standards as

provided in paragraph 4.c.(2).

f. *Major amendatory.* For the purposes of this Handbook, a significant change in the nature, magnitude or extent of the action from that which was originally evaluated and which may have a significant affect on the quality of the human environment, such as an environmentally significant change in location or site, area covered, size or design in which case they require environmental clearance. An increase or decrease in cost is considered a major amendatory only when the increase or decrease reflects such an environmentally significant change in the project.

g. *Threshold.* A criterion of size or of environmental impact above which a Special Environmental Clearance is always required. The threshold is designed to screen out the more important HUD actions for special attention. HUD thresholds are set forth in Appendix A-1 of this Handbook.

h. *Decision points.* Those points of Federal commitment in the decision-making process before which prescribed environmental clearances must be completed. HUD decision points are set forth in Appendix A-1 of this Handbook.

i. *Finding of inapplicability (negative statement).* A determination by an authorized HUD official, under the authority of the HUD Guidelines approved by CEQ, which are issued in accordance with the CEQ Guidelines implementing NEPA, that no Environmental Impact Statement is required for the proposed HUD action under consideration. The Finding of Inapplicability for project level actions is a part of the Special Environmental Clearance. The format for the Finding of Inapplicability for policy actions is set forth in Appendix F.

* * *

3. *General policy.* The national goal of "a decent home and a suitable living environment for every American family"—established by the Housing Act of 1949 and subsequently reaffirmed by Congress in 1968—is central to the mission of the Department of Housing and Urban Development (HUD). *The National Environmental Policy Act (NEPA) furthers this goal. While recognizing that adverse environmental impacts are sometimes unavoidable in pursuing other goals, NEPA requires that environmental values be given appropriate consideration in decision-making along with economic and technical factors.* The object is to achieve the optimum balance among competing needs and goals—not to stop the building of cities, but rather to build with foresight so that rational development is achieved with due regard for the capacity of natural and man-made systems and for the quality of life attained within the resulting environment.

In addition to the prevailing national emphasis on anti-pollution and conservation aspects, HUD is also concerned with the environment of urban areas and how it affects the quality of life. Efforts to improve the quality of the environment certainly involve the abatement and prevention of many annoying and threatening nuisances—air pollution, water pollution, land pollution, noise—which impinge on our daily living. But efforts to improve environmental quality also include more positive actions such as provision of open space, the development of aesthetically pleasing urban areas, provision of adequate access to employment and cultural opportunities, reductions in structural deficiencies, maintenance of high quality in new construction, and appropriate planning for the proper juxtaposition of spaces for various human activities.

a. It is the policy of the Department to reject proposals which have unacceptable environmental impacts, based on HUD environmental policies and standards, which cannot be avoided, and to encourage modification of project proposals or plans in order to enhance environmental quality and minimize environmental harm. At each stage of the environmental clearance HUD officials shall work with the applicant to seek means for avoiding adverse environmental impact, maximizing environmental quality, and considering superior alternatives.

b. When environmental clearances reveal conditions or safeguards which should be implemented once a project is approved in order to protect and enhance environmental quality or minimize adverse environmental impacts, such conditions or safeguards shall be set forth as requirements in the contract, grant, or other documents which delineate the obligations of the recipient. The contractor's performance in meeting such conditions shall be monitored and evaluated as part of the normal project monitoring and evaluation.

c. Environmental impact shall be evaluated on as comprehensive a scale as is feasible, with a view to the overall cumulative impact of HUD actions and programs, as well as the project specific impacts of a particular proposal. Environmental factors shall be considered as early as possible in the review and decision-making process.

d. Section 102(2)(A) of the National Environmental Policy Act directs all agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment." When making determinations regarding environmental impacts, HUD officials shall consult HUD professional

personnel, such as urban planners, landscape architects, civil engineers, sanitary engineers, architects, economists, demographers, sociologists, lawyers, and others who are qualified to provide advice on specialized and broad aspects of environmental concerns.

e. HUD officials shall continue to establish and review environmental policies, standards and procedures for administering HUD programs to promote environmental quality. HUD policies and procedures must be consistent with this Handbook.

* * *

CHAPTER 2—Environmental Clearances

5. *Environmental clearance policy on HUD actions.* The purpose of this section is to establish a procedure for determining whether a proposed HUD action is a "major Federal action significantly affecting the quality of the human environment", and whether the proposal should be accepted, rejected, or modified accordingly.

a. *General.* The procedure involves a three level environmental clearance process: Normal Environmental Clearance; Special Environmental Clearance; and Environmental Impact Statement Clearance.

Normal Clearance is essentially a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Special Clearance requires an environmental evaluation of greater detail and depth. Finally, an Environmental Impact Statement is the complete and fully comprehensive environmental evaluation, including formal review by other Federal, State and local agencies, as prescribed by section 102(2)(C) of NEPA.

Many HUD actions will be subject to a Normal Environmental Clearance. On the basis of that clearance, the proposed project shall be accepted, rejected, or modified accordingly. However, if, even after appropriate modification to mitigate environmental impacts, it is determined that there is potential significant environmental impact, Special Clearance procedures shall be initiated. If, after Special Clearance and the implementation of any changes mitigating environmental impacts, such impacts are still significant as a result of the action, an Environmental Impact Statement shall be prepared on the proposed action.

Not all proposed actions will undergo Normal Environmental Clearance. Some, because of their size or for other reasons, shall be processed directly through Special Clearance or Environmental Impact Statement Clearance. Projects which shall go directly through Special Clearance or Environmental Impact Statement Clearance are described in Appendices A and B-1.

All required environmental clearances shall be completed prior to the decision points described in Appendix A. The environmental clearance process is discussed further in Appendix B.

(1) *Exemptions.* Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this paragraph shall not apply to those HUD actions which have been determined not be "major Federal actions significantly affecting the quality of the human environment". These shall include an individual action on a one-to-four family dwelling, training grants, or rehabilitation and modernization projects which do not extend the life of a structure twenty (20) years or more. Exemptions from environmental clearances do not exempt these activities from the requirements of Section 106 of the National Historic Preservation Act of 1966 when a property is listed on, or nominated to, the Na-

tional Register of Historic Places. (See Appendix L for Advisory Council on Historic Preservation procedures.)

Planning assistance projects (701 Comprehensive Planning Assistance grants and other planning loans and grants) are exempted from the procedural requirements, but in lieu thereof an environmental assessment of the final planning product shall be required as part of the proposed planning program.

With respect to disaster relief and emergency activities of the Department, procedures for environmental clearance shall not apply to actions designed to meet the temporary housing needs of the affected population. Disaster activities which provide permanent housing and other recovery efforts will follow the environmental clearance procedures. However, where required by the serious nature of the situation and upon the approval of the Assistant Secretary for CPD, activities such as disaster related early land acquisition, clearance of damaged structures and relocation efforts may take place prior to the completion of the environmental review.

Except for these exemptions, all HUD actions must undergo one or more environmental clearances. (Emp. added)

(2) *Additional requirements.* The responsibilities and clearance requirements set forth in this paragraph represent minimum Departmental requirements. Regional Administrators and Area and Insuring Office Directors with the concurrence of the Regional Administrator have discretion to require such additional clearances and responsibilities as are deemed necessary for the effective implementation of this Handbook.

(3) *Controversy.* Decisions resulting from Normal or Special clearance shall give adequate consideration to existing or potential environmental controversy. Issues raised by opponents and supporters of the HUD actions

shall be carefully examined to determine whether the project involves significant environmental impacts. Major controversy which appears to raise substantive environmental issues is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated. For example, in the case of projects which would ordinarily require only Normal Clearance, major environmental controversy should weigh heavily in the decision to undertake a Special Clearance. Likewise for projects which normally require only Special Clearance, major controversy on environmental issues should weigh heavily in the decision to undertake Environmental Impact Statement Clearance.

(4) *Retroactivity.* To the maximum extent practicable, environmental clearance shall be required for uncompleted projects which have never gone through an environmental clearance under NEPA, at such time as a subsequent significant HUD action, such as the next stage of program approval or approval of a major amendatory, is proposed. Where it is not practicable to reassess the basic course of action, major attention should be given to measures, which, given the stage of project completion, may reduce adverse environmental impact. It is also important in taking further action that account be taken of environmental consequences not fully evaluated at the outset of the project.

(5) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. For example, several subdivisions may form a large new development. Likewise, a comprehensive project may be composed of, or include, several interrelated

activities, e.g., development of a new community or redevelopment of a center city area. In these cases, and where feasible, HUD offices should aggregate individual activities into a larger package and environmental evaluation shall concentrate on the broad and cumulative impacts of the larger activity, as well as the project specific impact of component activities to the extent known.

The comprehensive environmental evaluation will not satisfy the requirements of this Handbook, howeveer, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited scope will be necessary on subsequent, individual actions in order to fulfill the requirements of this Handbook.

Impacts of individual activities may be singularly limited but cumulatively considerable. One purpose of this provision, therefore, is to stimulate a more comprehensive environmental evaluation. In addition, there may be environmental impacts which are common to all or most components of the larger activity. A secondary purpose, therefore, is to eliminate duplicative evaluative efforts where possible. In no case shall this provision be interpreted to avoid a detailed examination of environmental impacts.

* * *

APPENDIX C

HUD Proposed Rules, 24 C.F.R. Part 50

Subpart B—Environmental Clearances on HUD Actions

§ 50.10 Purpose.

The purpose of this subpart is to establish a procedure for determining whether a proposed HUD action is a "major Federal action significantly affecting the quality of the human environment", and whether the proposal should be accepted, rejected, or modified accordingly.

§ 50.11 Environmental clearance process.

The procedure involves a three level environmental clearance process: Normal Environmental Clearance; Special Environmental Clearance; and Environmental Impact Statement Clearance. Normal Clearance is essentially a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Special Clearance requires an environmental evaluation of greater detail and depth. Finally, an Environmental Impact Statement is the complete and fully comprehensive environmental evaluation, including formal review by other Federal, State and local agencies, as prescribed by section 102(2)(C) of NEPA. Many HUD actions will be subject to a Normal Environmental Clearance. On the basis of that clearance, the proposed project shall be accepted, rejected, or modified accordingly. However, if, even after appropriate modification to mitigate environmental impacts, it is determined that there is potential significant environmental impact, Special Clearance procedures shall be initiated. If, after Special Clearance and the implementation of any changes mitigating environmental impacts, such impacts are still significant as a result of the action, an Environmental Impact Statement shall be prepared on the proposed action. The mere

mitigation of adverse effects does not indicate that a project has no significant impact; an Environmental Impact Statement may be required even though adverse effects have been mitigated. All required environmental clearances shall be completed prior to the decision points described in Appendix A.

(a) *Exemptions.* Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this subpart shall not apply to those HUD actions which have been determined not to be "major Federal actions significantly affecting the quality of the human environment". These shall include an individual action on a one-to-four family dwelling, training grants, or rehabilitation and modernization projects which do not extend the life of a structure twenty (20) years or more. Exemptions from environmental clearances do not exempt these activities from the requirements of section 106 of the National Historic Preservation Act of 1966 when a property is listed on, or nominated to the National Register of Historic Places.

(1) Planning assistance projects (701 Comprehensive Planning Assistance grants and other planning loans and grants) are exempted from the procedural requirements, but in lieu thereof an environmental assessment of the Final planning product shall be required as part of the proposed planning program.

(2) With respect to disaster relief and emergency activities of the Department, procedures for environmental clearance shall not apply to actions designed to meet the temporary housing needs of the affected population. Disaster activities which provide permanent housing and other recovery efforts will follow the environmental clearance procedures. However, where required by the serious nature of the situation and upon the approval of the

Assistant Secretary for CPD, activities such as disaster related early land acquisition, clearance of damaged structures, and relocation efforts may take place prior to the completion of the environmental review.

(3) *Except for these exemptions, all HUD actions must undergo one or more environmental clearances prior to the decision-points listed in Appendix A-1 to this part.* (Emp. added)

(b) *Limitation on actions pending clearance.* Pending preparation and completion of any environmental clearance, the appropriate HUD official may, after consultation with the Assistant Secretary for CPD or his designee, direct an applicant to refrain from taking any action with respect to a project which such official determines might have an adverse environmental effect or might so alter the environmental premises on which the clearance is based as to affect the validity of the conclusions reached. Such official may also direct the applicant to take such additional actions as he determines are necessary to preserve the status quo. The applicant shall promptly comply with all directions issued in accordance with this subsection.

(c) *Additional requirements.* The responsibilities and clearance requirements set forth in this subpart represent minimum Departmental requirements. Regional Administrators and Area and Insuring Office Directors with the concurrence of the Regional Administrator have discretion to require such additional clearances and responsibilities as are deemed necessary for the effective implementation of this part.

(d) *Controversy.* Decisions resulting from Normal or Special Clearance shall give adequate consideration to existing or potential environmental controversy. Issues raised by opponents and supporters of the HUD actions shall be carefully examined to determine whether the project involves significant environmental impacts. Major

controversy which appears to raise substantive environmental issues is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated. For example, in the case of projects which would ordinarily require only Normal Clearance, major environmental controversy should weigh heavily in the decision to undertake a Special Clearance. Likewise for projects which normally require only Special Clearance, major controversy on environmental issues should weigh heavily in the decision to undertake Environmental Impact Statement Clearance.

(e) *Retroactivity.* To the maximum extent practicable, environmental clearance shall be required for uncompleted projects which have never gone through an environmental clearance under NEPA, at such time as a subsequent significant HUD action, such as the next stage of program approval or approval of a major amendatory, is proposed. Where it is not practicable to reassess the basic course of action, major attention should be given to measures which, given the stage of project completion, may reduce adverse environmental impact. It is also important in taking further action that account be taken of environmental consequences not fully evaluated at the outset of the project.

(f) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. The comprehensive environmental evaluation will not satisfy the requirements of this part, however, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited

scope will be necessary on subsequent individual actions in order to fulfill the requirements of this part.

* * *

(h) *Environmental clearance forms.* Environmental clearance forms shall be used in conducting the required environmental clearance(s) for project level actions as directed in this part. Form ECO-1, completed by the applicant, shall be used by HUD principally as a source of factual information. An independent environmental assessment and evaluation shall be conducted by HUD on Form ECO-2 or Form ECO-3, or an Environmental Impact Statement shall be prepared. The completed clearances shall become part of the application file and shall accompany the proposal through the review and decision-making process.

(1) The Applicant's Environmental Information, Form ECO-1, shall be required of applicants for all project proposals except those exempted in § 50.11(a)(1). The applicant shall be provided with Form ECO-1 along with the required program application forms, and the environmental clearance requirements shall be explained in the earliest stages of contact and application preparation. The appropriate HUD official shall indicate to the applicant the initial level of environmental clearance required for the proposed project. The completed Form ECO-1 shall accompany A-95 notification where required. It shall be submitted to HUD with the completed application.

(2) After obtaining information from other sources, HUD shall evaluate and verify the information provided by the applicant on Form ECO-1. HUD may begin preparing the appropriate clearance worksheet at this time or may await the resolution of problems. The applicant shall be asked to modify or supplement Form ECO-1 as appropriate: If there is inadequate information,

the applicant shall be asked to supplement Form ECO-1 with documentation as necessary; if there are environmental problems, the applicant shall be asked to present solutions, modify the project, include measures to enhance environmental quality or reduce adverse environmental impacts, provide assurances and documentation as necessary, and amend or revise Form ECO-1 accordingly. HUD shall then complete the appropriate environmental clearance worksheet, or shall prepare the Draft Environmental Impact Statement.

(i) *Relationship Between A-95 procedures and environmental clearance procedures.* OMB Circular A-95 provides a mechanism for securing comments and views of State and local agencies regarding the impact, including environmental impact, of Federal and Federally-assisted projects. The A-95 requirements are coordinated, but not synonymous, with the requirements set forth in this part. Those programs or projects which are not subject to A-95 requirements are nevertheless subject to environmental clearance requirements unless specifically exempted in § 50.11(a)(1). The requirements of this part and OMB Circular A-95 shall be coordinated in the following manner:

(1) *Project Notification and Review System (PNRS).* The A-95 Project Notification and Review System requires that, for non-housing programs covered by Attachment D of the A-95 Circular, the applicant submit to the appropriate clearinghouses a notice of intent to file an application for Federal assistance. For housing projects exceeding A-95 thresholds listed in paragraph 7c of Attachment A and under programs listed Attachment D, HUD is required to send the application submitted by the applicant to the appropriate clearinghouses. Housing projects under A-95 thresholds are not subject to the A-95 requirements. Environmental clearances procedures

set forth in this part require that the applicant prepare Form ECO-1. For programs also covered by the A-95 Circular, such form shall accompany the A-95 submission.

(2) *Inclusion of A-95 Comments in Draft EIS.* A-95 review of a proposed project generally takes place prior to the preparation of an impact statement. Therefore, comments on the proposed project that are secured during this stage of the A-95 process must be included in the Draft EIS. The comments received from clearinghouses, or by State and local environmental agencies through clearinghouses, in the A-95 review shall be attached to the draft impact statement when it is circulated for review.

(3) *Review of environmental impact statement.* If an Environmental Impact Statement is required, HUD shall notify the appropriate A-95 clearinghouses of HUD's intent to prepare and file the Draft Statement. When the Draft Statement is distributed, HUD shall send copies of the Statement to the appropriate clearinghouses for review and comment, regardless of whether or not the subject proposal is covered by OMB Circular A-95. The clearinghouses shall also receive copies of the Final Statement for their information.

(j) *Updating environmental clearances.* Environmental clearances shall be updated by revision, amendment or addendum to the original clearance, if:

(1) Additional information with significant implications for environmental impact or additional environmental impacts not previously considered is discovered during the review process. Actions which went through Normal or Special Environmental Clearance shall be updated by revision, amendment or addendum to the original environmental clearance worksheet. A new finding shall then be made on the basis of all information,

and action taken accordingly. For actions for which a Draft and Final Environmental Impact Statement was prepared and distributed, the Final Statement shall be revised and reissued, or an addendum to the Statement shall be prepared and distributed. Such revision or addendum shall be subject to the same review and comment procedures as was the original Final Statement.

(2) Major amendatories are proposed. For major amendatories, the type and extent of environmental clearance required shall depend on the type, size and scale of the proposed action as amended. If an EIS is prepared for the amendatory, it shall be prepared and processed pursuant to § 50.14.

(3) HUD approval action is required for component activities whose environmental impacts were not addressed in sufficient detail in original environmental clearance for the larger action. Such clearance shall focus on the environmental impact of the specific project and site and need not treat the environmental impact on the more comprehensive level addressed in the original Environmental Impact Statement. A finding shall then be made as to the significance of the environmental impact of the specific project activity, and action taken accordingly. If an Environmental Impact Statement is prepared for the component activity, it shall be prepared and processed pursuant to § 50.14.

§ 50.12 Normal environmental clearance.

Normal Environmental Clearance shall be required for HUD actions for which it is not immediately evident that Special Environmental Clearance or Environmental Impact Statement Clearance is required. Normal Environmental Clearance is a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Information shall be requested

from the applicant on Form ECO-1 and gathered from other sources as appropriate. After modifications to the proposal to mitigate environmental impacts as necessary, HUD shall conduct an independent assessment and evaluation on Form ECO-2.

(a) *Responsibility for clearance.* Responsibility for Normal Environmental Clearance shall rest with the Area/Insuring Office program staff. An information copy shall be sent to the ECO.

(b) *Action resulting from clearance.*

(1) If after appropriate modifications to the proposal there exist environmental impacts which are unavoidable, and, based on HUD environmental policies and standards, such impacts are also considered unacceptable, then the proposal shall be rejected.

(2) If there is no significant environmental impact, processing of the proposal may proceed. Conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document.

(3) If after appropriate modifications to the proposal to mitigate environmental impacts, there remains significant or potentially significant environmental impact, Special Environmental Clearance or EIS, as appropriate, is required. The mere mitigation of adverse effects does not indicate that a project has no significant impact; an EIS may be required even though adverse effects have been mitigated.

§ 50.13 Special environmental clearance.

Project level actions found to require Special Environmental Clearance by virtue of their size or scale (in relation to the thresholds in Appendix A-1 to this part) or other characteristics indicating significant en-

vironmental impact, or as a result of Normal Environmental Clearance, shall be subject to the requirements in paragraph (a) of this section. Proposed legislation, regulations, policy issuances, guidance documents, and revisions to such regulations and documents, which may have significant environmental impact, shall be required to undergo the Special Environmental Clearance for policy actions as set forth in paragraph (b) of this section.

(a) Project level actions. Special Environmental Clearance for project level actions is a preliminary version of the analysis required in the Environmental Impact Statement. It provides the HUD official with a factual basis for determining whether the proposed action has a significant environmental impact and hence, whether it should be approved, rejected, or modified, or whether an Environmental Impact Statement is required. Information required shall be requested from the applicant on Form ECO-1 and gathered from other sources as appropriate. After modifications to the proposal to mitigate environmental impacts as necessary, HUD shall conduct an independent assessment and evaluation. On the basis of this assessment an environmental finding shall be made and accompany the application through the review process.

* * *

(2) *Action resulting from clearance.*

(i) If after appropriate modifications to the proposal, there exist environmental impacts which are unavoidable, and, based on HUD environmental policies and standards, such impacts are also considered unacceptable, then the proposal shall be rejected.

* * *

(iii) If after appropriate modifications to the proposal to mitigate environmental impacts, there remains

significant or potentially significant environmental impact, an Environmental Impact Statement shall be prepared. The mere mitigation of adverse effects does not indicate that a project has no significant impact; an EIS may be required even though adverse effects have been mitigated.

* * *

§ 50.14 Environmental impact statement clearance.

Environmental Impact Statement Clearance shall be required for all major HUD actions significantly affecting the quality of the human environment.

(a) *Environmental impact statement.* The Environmental Impact Statement is comprised of two stages, Draft and Final.

(1) *Notice of intent to file an environmental impact statement.* As soon as practicable after a determination is made that a HUD action will require the preparation and circulation of an environmental impact statement, a Notice of Intent to File shall be prepared to inform the public and to solicit comments that may be helpful in preparing the statement. Copies of this notice shall be sent to local newspapers, groups known to be interested in the agency's activities, the chief executive of the general unit of local government, local and State agencies, A-95 clearinghouses, the Assistant Secretary for CPD, the RO and CO-ECOs, and the RO Public Information Officer. When the appropriate HUD official determines that an environmental impact statement is not necessary, a Notice of Intent Not To File an EIS shall be prepared to inform the public under the following circumstances:

(i) HUD has previously announced the action would be the subject of an environmental impact statement; or

(ii) HUD has made a Finding of Inapplicability in response to a request from CEQ for the preparation and

circulation of an EIS.

The notice shall include a statement of the reasons for this decision. This determination and the reasons for the decision shall be prepared and disseminated in the same manner as a Notice of Intent to File an EIS.

* * *

(d) *Action resulting from clearance.* Based on the Environmental Impact Statement clearance, including comments and suggestions by other agencies and interested parties, HUD shall attempt to mitigate adverse environmental impacts to the extent practicable. If there remain adverse environmental impacts which are unavoidable, and based on HUD environmental policies and standards, such impacts are also considered unacceptable, the proposal shall be rejected. Otherwise, unavoidable adverse environmental impacts shall be weighed against benefits to be obtained from approval of the proposal. Where environmental costs which would be incurred outweigh such benefits, the proposal shall be rejected. Where benefits of the proposal outweigh environmental costs, processing may proceed; conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document.

APPENDIX D

Title 24—Housing and Urban Development

Subpart B—Delegations of Basic Authority and Functions

§ 1700.80 Director of the Examination Division, Office of Interstate Land Sales Registration, and Deputy.

To the position of Director of the Examination Division, Office of Interstate Land Sales Registration, and under his supervision to the position of Deputy Director there are delegated and assigned the following authorities and responsibilities.

(a) To receive and examine all statements of record and property reports filed under the provisions of the Interstate Land Sales Full Disclosure Act and all amendments and corrections to such statements.

(b) To determine the adequacy of disclosure of statements of record and property reports and amendments thereto and to effect corrections, additions, and deletions in such statements and reports deemed necessary to achieve the purposes of the Interstate Land Sales Full Disclosure Act.

(c) To find effective or to recommend to the Administrator that he declare not effective statements of record filed under the Interstate Land Sales Full Disclosure Act and to prepare and present evidence in connection with hearings and other administrative proceedings relative to statements of record declared not effective.

* * *

§ 1710.45 Suspensions.

(a) *Suspension notice—prior to effective date.*—(1) A suspension notice with respect to a Statement of Record or an amendment may be issued to a developer by the

Secretary within 30 days after the date of filing if prior to its effective date, the Secretary has reasonable grounds to believe that a Statement of Record is on its face incomplete or inaccurate in any material respect; or prior to its effective date, the Secretary has reasonable grounds to believe that an amendment is on its face incomplete or inaccurate in any material respect.

(2) Suspension notices issued pursuant to this subsection shall suspend the effective date of the statement or the amendment until 30 days, or such earlier date as the Secretary may determine, after the developer files such additional information as the Secretary shall require

(3) A developer, upon receipt of a suspension notice may request a hearing within 15 days of receipt of such notice. Such hearing shall be held within 20 days of receipt of such request by the Secretary.

(4) Suspension notices issued pursuant to this section shall continue in effect until all deficiencies cited in the notice are corrected.

(b) *Suspension orders—subsequent to effective date.*—(1) A notice of proceedings to suspend an effective Statement of Record may be issued to a developer if the Secretary has reasonable grounds to believe that an effective Statement of Record includes an untrue statement of a material fact, or omits a material fact required by the Act or the rules and regulations, or omits a material fact which is necessary to make the statements therein not misleading. The Secretary may, after notice, and after opportunity for a hearing requested within 15 days of receipt of such notice, issue an order suspending the Statement of Record. In the event that a suspension order is issued, such order shall remain in effect until the developer has amended the Statement of Record or otherwise complied with the requirements of the order.

When the developer has complied with the requirements of the order, the Secretary shall so declare and thereupon the suspension order shall cease to be effective.

(2) If the Secretary undertakes an examination of a developer or his records to determine whether a suspension order should be issued, and the developer fails to cooperate with the Secretary or obstructs, or refuses to permit the Secretary to make such examination, the Secretary may issue an order suspending the Statement of Record. Such order shall remain in effect until the developer has complied with the requirements of the order. When the developer has complied with the requirements of the order, the Secretary shall so declare and thereupon the suspension order shall cease to be effective.

(3) Upon receipt of an amendment to an effective Statement of Record, the Secretary may issue an order suspending the Statement of Record until the amendment becomes effective if he has reasonable grounds to believe that such action is necessary or appropriate in the public interest or for the protection of purchasers.

(4) Suspension orders issued pursuant to this subsection shall operate to suspend the Statement of Record as of the date the order is either served on the developer or his registered agent or is delivered by certified or registered mail . . .

* * *

As to the "not misleading" requirement, see Instruction A(2) of the Instructions for Completion of the Statement of Record, 24 C.F.R. Sec. 1710.105, which requires that

> "in addition to the information expressly required to be stated in the statement of record, there shall be added such further material information, documentation and certification, *if any, as may be neces-*

sary in the public interest and for the protection of purchasers or necessary in order to make the statements in the light of the circumstances under which they are made, not misleading.

APPENDIX E

5th Annual Report of C.E.Q. (pp. 21-26, 489-90)

* * *

Leisure Homes and Recreational Development

As incomes and leisure time have increased over recent years, there has been a growing demand for recreational facilities in rural areas. Out of this demand have come the phenomena of leisure home and recreational lot developments—high density developments in rural settings. These phenomena create the same types of costs as the forms of urbanization described above. With recreational developments, in fact, the long-term costs of development to both property owners and the public may be greater than in most urban areas, and there may be more urgent need for effective controls.

Leisure home developments, of course, are not a new phenomenon. The Florida east coast, Cape Cod, Estes Park, and Lake Tahoe have been the sites of second home construction for many decades. Originally, these homes were owned almost exclusively by wealthier Americans, and houses were often expensive and built on large sites.

The more recent boom in second homes and recreational lots has involved a far broader stratum of society. Increased affluence has given more Americans the opportunity and desire to obtain such properties for themselves. This, combined with a widespread belief in the profitability of investment in land and reinforced by favorable income tax laws, has provided the ingredients for the recreational land and leisure home boom. The lots are smaller, the houses are more spare than traditional summer homes, and demand is many times greater than it was even a few years ago. Today approximately

3.4 million American families own second homes. Including owners of recreational lots, a total of 5 to 7 million American families are estimated to own recreational properties of some kind.

Table 4 presents a number of characteristics of households owning leisure homes. It shows clearly that these homes are no longer the province of the very wealthy. They are owned by families somewhat wealthier and somewhat older than the average but still comprising essentially a cross section of society. (Corresponding information about owners of recreational lots is not available, although there is evidence that they tend to be less affluent.)

The material on leisure homes and other recreational properties was obtained from a study on leisure homes undertaken by the American Society of Planning Officials for the Council on Environmental Quality in association *with the Department of Housing and Urban Development* and the Appalachian Regional Commission. The study indicates the importance of distinguishing between two separate aspects of the phenomenon: (1) the purchase of recreational lots, which are usually part of large subdivisions of plotted land where few of the lots may ever be developed; and (2) the ownership of leisure homes, which may be built by the owner in a subdivision or on a separate site, or built in large numbers by a developer.

Récreation lot sales often result from mail solicitation or telephone calls, and many buyers sign sales contracts without ever seeing the land. The Interstate Land Sales Act requires most lot sales in interstate commerce to be registered with the Office of Interstate Land Sales at the Department of Housing and Urban Development. Table 5, showing the regional breakdown of projects so registered, and Table 6, showing leisure homes by region,

Table 4

Selected Characteristics of U.S. Leisure Home Owners and Total U.S. Population

Characteristic	Percent of all households	Percent of leisure home owners	Leisure home owners as a percent of total households
Annual family income			
Less than $5,000	29.4	18.8	2.9
$5,000 to $9,999	30.9	24.5	3.6
$10,000 to $14,999	22.6	23.7	4.7
$15,000 to $24,999	13.2	20.9	7.2
$25,000 or more	3.9	12.1	14.1
Value of primary home			
Less than $15,000	41.3	31.3	3.4
$15,000 to $19,999	20.2	17.8	4.0
$20,000 to $24,999	14.7	13.5	4.1
$25,000 to $34,999	14.1	18.1	5.8
$35,000 to $49,999	6.5	10.7	7.4
$50,000 or more	3.2	8.6	12.2
Tenure of primary home			
Owned	59.3	73.1	5.6
Rented	35.4	22.7	2.9
Co-op or condominium	0.5	1.1	11.0
Other	4.8	3.1	2.9
Primary residence			
Inside SMSAs	69.1	68.0	4.4
Central city	34.1	31.0	4.1
Urban balance	24.7	26.2	4.8
Remainder	10.4	10.8	4.7
Outside SMSAs	30.9	32.0	4.7
Urban	75.1	75.2	4.5
Rural	24.9	24.8	4.5
Rural-nonfarm	20.0	20.3	4.6
Rural-farm	4.9	4.5	4.1
Places 10,000 to 50,000	20.4	21.9	4.8
Age of head of household			
Less than 25 years	7.1	4.0	2.5
25 to 34 years	21.0	10.0	2.1
35 to 44 years	21.2	18.5	3.9
45 to 54 years	20.1	25.9	5.8
55 to 64 years	17.5	22.7	5.9
65 years or older	13.1	18.9	6.5
Family size			
1 person	17.6	13.3	3.4
2 persons	29.6	35.0	5.3
3 persons	17.2	18.1	4.7
4 or 5 persons	25.2	24.8	4.4
6 or more persons	10.4	8.8	3.8

Source: Richard L. Ragatz Associates, *Recreational Properties: An Analysis of the Markets for Privately Owned Recreational Lots and Leisure Homes* (Springfield, Va.: National Technical Information Service, 1974).

Table 5

Recreational Properties Registered with the Office of Interstate Land Sales

	Acres in projects		Lots in projects	
	Total	Per 100 acres of region's area	Total	Per 100 families in region
United States	**7,146,229**	**0.5**	**3,375,821**	**5.3**
Northeast	**231,555**	**0.2**	**133,671**	**0.9**
New England	77,251	0.2	36,766	1.0
Middle Atlantic	154,304	0.2	96,905	0.8
North Central	**279,214**	**0.1**	**224,886**	**1.3**
East North Central	168,634	0.1	132,389	1.1
West North Central	110,580	0.04	92,497	1.8
South	**3,370,140**	**1.0**	**2,037,908**	**10.6**
South Atlantic	2,243,119	1.4	1,113,146	11.8
East South Central	127,291	0.1	123,022	3.2
West South Central	999,730	0.4	801,740	13.5
West	**3,265,320**	**0.8**	**979,356**	**8.8**
Mountain	2,489,408	0.9	750,270	29.8
Pacific	775,912	0.6	229,086	2.6

Source: Richard L. Ragatz Associates, *supra* Table 4, pp. 84, 87, 500.

Table 6

U.S. Leisure Homes by Region, 1970

Region	Total housing units	Leisure homes[1]	Percent of all housing units in region	Percent of all leisure homes in United States
United States	**68,418,094**	**2,143,434**	**3.1**	**100.0**
Northeast	**16,641,954**	**556,790**	**3.4**	**26.0**
New England	4,031,531	221,806	5.5	10.4
Middle Atlantic	12,610,423	334,984	2.7	15.6
North Central	**19,018,773**	**667,148**	**3.5**	**31.1**
East North Central	13,323,755	421,225	3.2	19.7
West North Central	5,695,018	245,923	4.3	11.5
South	**20,730,508**	**631,242**	**3.0**	**29.5**
South Atlantic	9,970,059	287,374	2.9	13.4
East South Central	4,184,006	127,039	3.0	5.9
West South Central	6,576,443	216,829	3.3	10.1
West	**12,026,859**	**288,254**	**2.4**	**13.5**
Mountain	2,762,783	115,901	4.2	5.4
Pacific	9,264,076	172,353	1.9	8.0

[1] "Leisure Homes" are enumerated by combining the Bureau of the Census categories "Rural Seasonal Vacant" and "Other Rural Vacant." This combination basically includes housing units which are intended for occupancy during only certain seasons of the year.

Source: Richard L. Ragatz Associates, *supra* Table 4, p. 91.

indicate a heavy concentration of lots in the South and in the West. Six states—Florida, Texas, California, New Mexico, Arizona, and Colorado—contain over 80 percent of the acreage in registered recreational lot sales projects.

These figures demonstrate that recreational land and leisure home developments have become very important in the United States. With them have come a host of problems. Some problems are consumer-related, such as fraudulent advertising and high pressure sales tactics used to take advantage of naive buyers. Attempts are being made to curb these unethical practices through implementation of the Interstate Land Sales Act at the Federal level and through similar laws in some states.

Other problems arise because such development brings what amounts to instant urbanization to rural communities—communities where local governments have little experience with the impacts of large-scale development and few land use controls or regulatory bodies to deal with them.

Many leisure homes are being built in subdivisions that differ little in appearance from typical middle income suburban developments. Yet they are often built to much lower standards. If the home remains a summer weekend retreat, this may not create serious problems. But experience shows that seasonal homes are often converted into year-round homes and leisure home developments into permanent communities. This process may take a few years or decades, depending on the proximity of the homes to urban employment areas. In the mountains of northern Virginia, some homes in recreational subdivisions are being occupied as first homes from the time they are built, with their occupants commuting two hours or more to jobs on the fringes of Washington and Baltimore. School buses can be seen serving these developments

soon after the first houses go up. In short, the leisure home subdivision of today is likely to become the permanent settlement or suburb of tomorrow and should be viewed as an early form of urbanization.

This being true, it is necessary for a community to consider very carefully what development standards are appropriate for these subdivisions, particularly in communities with little growth experience, where officials are not equipped to cope with rapid growth and change. Many rural communities initially welcome second home developments in the expectation that they will provide property tax revenue and income for the local economy. They usually do, but they also create costs. Local governments often end up bearing the cost of increased demands the developments place on such public services as fire and police protection, road maintenance, water supply, solid waste disposal, and sewers. As long as recreational subdivisions remain seasonally occupied, these costs are likely to be lower than the property tax revenues generated by the development. However, as soon as residences become permanent, costs to the host communities will rise rapidly as schools, medical facilities, and other public services are required.

The eventual public costs will be particularly high if the development was originally built to low standards. Septic fields may have to be replaced by a sewer system; poorly constructed roads may have to be rebuilt. Replacing such facilities is very expensive, often more expensive than building adequate facilities at the time of the initial development.

Now only will the costs of low quality development be higher to the government, but they will also be higher to the homeowners. Inadequate insulation, poor drainage, and insufficient heating capacity may be small

problems during summer weekends, but they become major concerns at other times of the year.

The developments may also create serious environmental problems, although many of these can be avoided by careful design and review. Inadequate septic systems can pollute streams or aquifers and thus cause public health problems. Serious erosion can clog streams with silt. Demand for water can overtax local supplies. These environmental problems can cause particular difficulty because the most desirable sites for recreational developments are often in fragile environments unsuitable for housing development, such as steep mountain slopes, coastal dunes, or marshes.

In addition to such environmental problems, the developments also present potential conflicts with public recreational goals. The crowding of seasonal homes along the coast or around the shore of a lake often denies access to those resources for public recreation. And developing land adjacent to national parks and forests guarantees the owners that they will always have ready access to natural areas, but it prohibits the later expansion of public land holdings for the benefit of the general public.

Many of these problems are very similar to those faced in urban areas. The CEQ's study of second homes, mentioned above, will attempt to help rural communities in dealing with proposed developments. One specific product of the study is an impact evaluation handbook for local officials to use in assessing the costs and benefits of proposed recreation developments.

* * *

Leisure Homes Study

The Council, in association with the Department of Housing and Urban Development and the Appalachian

Regional Commission has sponsored an 18-month study of leisure home and similar recreational land projects. The study was conducted by the American Society for Planning Officials with the Conservation Foundation, the Urban Land Institute, and Professor Richard Ragatz of the University of Oregon as subcontractors. Some of the results of this study are discussed in Chapter 1 of this Annual Report.

The first part of the study involved an extensive analysis of the market for recreational properties. Using several new sources of data, this analysis summarizes what is known about the number and location of lots developed, homes built, projects started, facilities provided, and about the developers and owners of these properties. This analysis also includes regional projections of recreational developments.

The second part of the study involves an analysis of the economic environmental, social, and political impacts of leisure homes and certain other types of recreational developments on the localities and regions in which they occur. This analysis is based on an extensive review of previous research on leisure home development as well as a number of case studies undertaken by the research team. As mentioned in Chapter 1, the study concludes that leisure homes are over time converted into permanent residences and therefore should be viewed as a special form of early urbanization which generates the same types of economic, environmental, and social impacts as other residential developments. Further, leisure home developments may create more serious environmental problems than most residential developments because they often take place where there are few effective land use controls and are often built to lower standards and in less suitable environments—for example, on

mountainsides or in wetlands—than normal surburban subdivisions.

In terms of their economic impact on the local government, the study finds that as long as they are used only for recreational purposes, leisure homes usually generate tax revenues in excess of the costs of the public services required. However, as the developments become converted to permanent homes, these costs may exceed the tax payments, particularly if conversion results in a need for public investment to upgrade or replace roads, water supplies, and sewers.

Private recreational developments may also create social problems resulting from the impact of outsiders on the local culture and the way such developments interfere with the public's use of valuable recreational environments.

Finally, the study analyzes and recommends local, state, and Federal legislative mechanisms for mitigating the various adverse impacts that the developments may generate.

The results of the study will be published by CEQ and HUD. One volume will summarize the findings of the study, and a second volume will be a handbook for use by local officials in reviewing and evaluating the probable impacts of proposed projects.

APPENDIX F

15 U.S.C. § 1705

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

§ 1706. Effective date of statements of record and amendments thereto—Thirtieth day after filing or such earlier date as determined by Secretary; consolidation of subsequent statement with earlier recording

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

Incomplete or inaccurate statements of record

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incom-

plete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

Amendment of statement of record

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

Suspension of statement of record containing untrue statement or omission to state material fact; notice and hearing; termination of order of suspension

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in

accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

* * *

§ 1707. Information required in property report; use for promotional purposes

(a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1705 of this title. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

* * *

Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1975

No. 75-510

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Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HARRY A. RISSETTO
THOMAS C. WATSON
EDWIN KRONFELD
1800 M Street, N.W.
Washington, D.C. 20036

F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135
Counsel for Petitioner

OF COUNSEL:
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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Respondents in their Opposition attempt to divert the Court's attention from the important issues raised by Flint Ridge and the Solicitor General by throwing up a smoke-screen consisting of, *inter alia*, (a) the unexplained assertion that the District Court order

---

*The Solicitor General of the United States has also petitioned for a writ of certiorari (No. 75-545) on behalf of the Secretary of Housing and Urban Development (HUD) to review the judgment and opinion of the Tenth Circuit in this case.

appealed to the Tenth Circuit by Flint Ridge does not exist thus leaving the Court without jurisdiction, (b) the repeated comingling of the National Environmental Policy Act (NEPA) as a whole with the only subsection of NEPA at issue here – concerning written environmental impact statements – and (c) an emotional argument on alleged environmental effects which conveniently ignores both the State of Oklahoma's authority over land use and the complete lack of any such authority by HUD under the Interstate Land Sales Full Disclosure Act (ILSA).

1. Respondents assert without further explanation (Opp. pp. 1-2) that the Court lacks jurisdiction on the grounds that Flint Ridge's Notice of Appeal to the Tenth Circuit designated an order of the District Court that does not exist. That order exists. It is reprinted in the appendices of the petitions for certiorari of both Flint Ridge (App. B, p. 13b) and the Solicitor General (App. C, p. 31a). The Tenth Circuit summarily denied respondents' motion to dismiss the appeal on what appears to be the same ground.[1]

2. Respondents attempt to mask the issues in this case by repeating the refrain: NEPA applies to HUD. No one disputes that general rule. This case, however,

[1]To the extent respondents' naked assertion can somehow be construed as suggesting that Flint Ridge's Notice of Appeal, quoted in respondents' Opposition at p.2, was in some way inadequate, we point out that as required by Rule 3(c) of the Federal Rules of Appellate Procedure, the Notice (1) specifies that Flint Ridge is the party taking the appeal, (2) designates the order appealed from by description and date, and (3) names the Tenth Circuit as the court to which the appeal is taken.

involves the question of whether HUD's checking and requiring correction of a statement of record *triggers* the written environmental impact statement requirement of section 102(2)(C) of NEPA (42 U.S.C. § 4332(2)(C)). That requirement is triggered only when a Federal agency undertakes "major Federal actions significantly affecting the . . . environment."[2] Although NEPA as a whole applies to all Federal agencies, "*major Federal* action" is a threshold that must be met before a written environmental impact statement is required.[3] Thus, Federal agencies can issue rules for compliance with NEPA without undertaking to prepare an environmental impact statement for every agency action. *See, e.g., NRDC v. SEC*, 389 F.Supp. 689 (D. D.C. 1974).

3. Respondents suggest that the issues in the present case were decided in *NRDC v. SEC*, 389 F.Supp. 689 (D. D.C. 1974) and subtly suggest that the SEC's failure to appeal that decision renders it dispositive of the

[2]The distinction between the applicability of NEPA as a whole and the specific written environmental impact statement requirement in section 102(2)(C) of NEPA has been previously recognized by the Court:

> "NEPA does create a discreet procedural obligation on government agencies to give *written* consideration of environmental issues *in connection with certain major federal actions*. . . ."
>
> Aberdeen and Rockfish R.R. Co. v. S.C.R.A.P., ____ U.S. ____ (1975) (SCRAP II), 43 U.S.L.W. 4844, 4853 (U.S. June 24, 1975) (Emphasis supplied).

[3]Council on Environmental Quality, Guidelines for Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.6(c).

issues in this case because ILSA is patterned after the Securities Act of 1933. Respondents fail to point out, however, that the environmental impact statement requirement at issue in the instant case was not even present in *NRDC v. SEC.* Indeed, NRDC petitioned for a rulemaking to require disclosure of environmental information by *companies* filing with the SEC – not preparation by the SEC of an environmental impact statement on each filing. The district court had no occasion to address the environmental impact statement requirement of NEPA and held only that "[t]he SEC failed to comply with the *procedural requirements* of the APA [Administrative Procedure Act] in adopting rules which fulfill NEPA . . . ." *Id.* at 702 (Emphasis supplied). No petition for such a rulemaking has ever been filed by respondent Scenic Rivers. Moreover, as the Solicitor General states in his petition (p. 14), the SEC has advised him that it believes the Court should grant the writ because of the decision's possible effect on securities regulation. Because ILSA was patterned after the Securities Act of 1933, the Tenth Circuit decision is direct precedent for requiring the SEC to suspend securities registration statements until it prepares environmental impact statements.

4. Throughout their Opposition, respondents imply that HUD takes action under ILSA that *permits private parties* to engage in activities that affect the environment. HUD's authority, however, is limited to checking and requiring correction within the four corners of an antifraud disclosure document and to preventing fraudulent sales practices. Respondents do not and cannot cite any provision of ILSA empowering HUD to participate in the development's planning, financing or

construction or to authorize, permit, or approve the development. It is undisputed in this case that the site selection, financing, planning, and construction of utilities, roads, and other common improvements in the development began long prior to Flint Ridge's filing of its statement of record with HUD [R 533] and has continued uninterrupted. Consequently, any activities of Flint Ridge that affect the environment occurred *prior to and entirely independent of any HUD action* and are not subject to any subsequent permission or approval by HUD. Therefore, there was clearly no *Federal* action by HUD that permitted or could have prevented an effect on the environment. This underscores the significance of the issue presented to the Court: whether "major Federal action[ ] . . . affecting the . . . environment" really means "*any* Federal action."

5. Notwithstanding this complete absence of any *Federal* action that affects the environment, respondents attempt both to paint a horror story of "total destruction" of the entire Illinois River Basin and then to merge this purported environmental impact with HUD's limited authority to check and require corrections within the four corners of an antifraud disclosure statement.

Although maintaining that the private activities of Flint Ridge that may affect the environment do not constitute "*Federal* action" and were thus irrelevant to the issues in this case, Flint Ridge also vigorously disputed that septic tanks in the development will discharge sewage into the Illinois River and thus destroy the entire River Basin. The only conceivable basis for the finding was the nonexpert opinion testimony of Scenic Rivers' witnesses Jerry Overton and Thomas Aley. Overton, a graduate student in geography, offered

his opinion, based on a study he made of the Illinois River Basin, that effluent from septic tanks at the Flint Ridge Development would flow into tributaries and in some cases into the Illinois River almost as primary sewage [R 59]. On cross-examination, however, Overton admitted that his study did not even include a determination of the type of soil found in Delaware County in which the Flint Ridge Development is located [R 88]. Aley, a hydrologist, testified to the same effect on the basis of an experimental test he conducted on one septic tank located in Doniphan, Missouri, approximately 250 miles from Flint Ridge, where according to Aley the soil conditions were greatly similar [R 263-264]. On cross-examination, Aley admitted that although he had read some unidentified soil reports he did not conduct any soil analysis in the Flint Ridge area [R 264] and made no inquiry as to the type of septic tanks to be used [R 265]. This testimony piles presumption upon presumption to reach the dizzying heights of pure speculation.

The Oklahoma State Department of Health regulates septic tanks and has authority to prohibit pollution therefrom. 63 Okl. Stat. Ann. §§ 1-909 & 1-910. The Commissioner and two registered professional sanitarians of the Department testified that the use of septic tanks in the Flint Ridge Development *was approved and would not pollute the Illinois River* on the basis of percolation tests of the land in the development [R 442-443, 451-455]. A registered professional engineer testified on the basis of percolation tests and six 90 to 100 feet soil boring cores that neither raw sewage nor effluent will ever flow into the Illinois River from the septic tanks to be installed at the Flint Ridge Development [R 491-496].

6. Respondents give the misleading impression in their Oppositions to both Flint Ridge's and the Solicitor General's petitions that HUD has failed to follow its own regulations. Those regulations are clearly inapplicable to filings under ILSA. The letter from George K. Bernstein, Interstate Land Sales Administrator at HUD, which is appended to *respondents'* Opposition (App. A, p.1a), states: "[d]isclosure filings required by the Interstate Land Sales Full Disclosure Act are not considered federal actions for purposes of compliance with the National Environmental Policy Act and implementing regulations." Moreover, respondents raised this same argument in the Tenth Circuit and it was apparently not deemed to be of sufficient substance to even warrant mention in the court's opinion.

7. Respondents try to sidestep the conflict in principle between the decision of the Tenth Circuit and the holding in *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973) (SCRAP I). SCRAP I held that NEPA does not *sub silentio* amend or repeal *by implication* any other statute. Respondents, however, state:

> "Only where an agency would have to *disobey a specific statutory command* in order to apply NEPA would the latter statute give way."
>
> (Opp. p. 13) (Emphasis supplied).

We agree that this argument is an accurate restatement of the effect of the Tenth Circuit's decision. It clearly shows the conflict in principle between that decision and SCRAP I. Even under this extreme standard, however, the environmental impact statement requirement of NEPA would have to give way to the operation of ILSA. Section 1706(a) of ILSA provides that a statement of record filed by a developer automatically

becomes "effective" 30 days after filing.[4] Under section 1706(b), HUD is empowered to suspend the effective date of a statement of record *only* if it appears to HUD to be ". . .on its face incomplete or inaccurate in any material respect. . . ." HUD is required by the Tenth Circuit decision, however, to flatly *disobey* sections 1706(a) & (b) and suspend the automatic effective date of a statement of record that is *not* on its face incomplete or inaccurate in any material respect. *A fortiori*, the decision of the Tenth Circuit amends *sub silentio* or repeals by implication sections 1706(a) & (b) and thus conflicts in principle with the holding in *SCRAP I*.

---

[4] Respondents' attempt to imply that the 30-day effective date is *not* automatic when they say: "[U]nder § 1706(a) of ILSA the Statement of Record becomes effective 30 days after filing *but the Secretary is required to give due regard to protection of purchasers and the public interest in determining the actual effective date*." (Opp. p. 15) (Emphasis supplied). Section 1706(a), however, provides that "... the effective date of a statement of record... *shall be* the thirtieth day after filing thereof *or such earlier date as the Secretary may determine, having due regard to* the public interest and the protection of purchasers." (Emphasis supplied).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY A. RISSETTO
THOMAS C. WATSON
EDWIN KRONFELD
1800 M Street, N.W.
Washington, D.C. 20036

F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Counsel for Petitioner

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

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(Cover continued on reverse side)

HARRY A. RISSETTO
EDWIN KRONFELD
THOMAS C. WATSON
HERBERT F. STEVENS
1800 M Street, N.W.
Washington, D.C. 20036

F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Counsel for Petitioner
Flint Ridge Development Company

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 11

ARGUMENT

I. HUD DID NOT UNDERTAKE A "MAJOR FEDERAL ACTION[] SIGNIFICANTLY AFFECTING THE ... ENVIRONMENT" REQUIRING PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT UNDER SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT BECAUSE HUD'S AUTHORITY WAS STRICTLY LIMITED TO CHECKING AND REQUIRING CORRECTION OF FLINT RIDGE'S ANTIFRAUD DISCLOSURE DOCUMENT FILED PURSUANT TO THE INTERSTATE LAND SALES FULL DISCLOSURE ACT AND HUD DID NOT, AND HAD NO AUTHORITY TO, PARTICIPATE IN THE PLANNING, FINANCING, OR CONSTRUCTION, OR, TO AUTHORIZE, PERMIT, OR APPROVE THE FLINT RIDGE DEVELOPMENT 13

A. Where The Federal Agency Has No Responsibility For Or Control Over The Activities Of A Private Party That Affect The Environment Because The Federal Agency Has No Discretion Under Its Organic Statute To Halt Or To Modify The Scope Of Such Activities, There Is No Major Federal Action Significantly Affecting The Environment 14

Page

B. HUD's Action Under ILSA Does Not Constitute "Major Federal Action[] Significantly Affecting The ... Environment" Under Any Of The Tests Adopted To Date 19

C. None Of The Cases Relied Upon By The Court Below Support Its Conclusion That HUD Undertook Major Federal Action Significantly Affecting The Environment Because, In Contrast to ILSA, The Organic Statutes Involved In Each Of Those Cases Provided For Federal Control Over, Involvement In, Or Approval And Funding Of The Activities Of Private Parties That Affected the Environment 24

D. The Conclusion Of The Court Below That HUD Undertook A Major Federal Action Significantly Affecting The Environment Rests Upon A Fundamental Misunderstanding Of The Operation And Scope Of The Interstate Land Sales Full Disclosure Act 30

II. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE ANNOUNCED IN SCRAP I THAT NEPA DOES NOT SUB SILENTIO AMEND OR REPEAL BY IMPLICATION ANY OTHER STATUTE BECAUSE NOTWITHSTANDING THAT ILSA MAKES FILINGS THEREUNDER AUTOMATICALLY EFFECTIVE IN 30 DAYS AND AUTHORIZES SUSPENSION OF FILINGS *ONLY* FOR INCOMPLETENESS OR INACCURACY ON THEIR FACE OR FOR FRAUD, THE DECISION BELOW SUSPENDED FLINT RIDGE'S FILING INDEFINITELY BEYOND THE 30 DAYS SOLELY TO GIVE HUD TIME TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT 34

Page

CONCLUSION 40

APPENDIX 1a

TABLE OF CITATIONS

Cases:

Aberdeen and Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP II), 422 U.S. 289 (1975) 16

Arrow Transportation Co. v. Southern Ry. Co., 372 U.S. 658 (1963) 35

Biderman v. Morton, 497 F.2d 1141 (2nd Cir. 1974) 17, 18

City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972) 28

City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) 16, 22

Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) ... 24, 25, 32

Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) 17, 29

Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972) (*en banc*) 17

Greene County Planning Board v. FPC, 455 F.2d 412 (2nd Cir. 1972) 17, 25, 26

Hanly v. Mitchell, 460 F.2d 640 (2nd Cir. 1972) 19, 23

Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D. D.C. 1971) 25, 26

Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) 27

Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974) (*en banc*) 20, 21, 23

Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2nd Cir. 1972) 28

National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973) 21, 23

Page

Natural Resources Defense Council v. SEC, 389 F.Supp. 689 (D. D.C. 1974) 13, 39

Proetta v. Dent, 484 F.2d 1146 (2nd Cir. 1973) 27

San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) 26, 27

Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) 22

Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974) 27, 28

Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973) 27

Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) 27

Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971) 29

United States v. Students Challenging Regulatory Agency Procedures (SCRAP I), 412 U.S. 669 (1973) 34, 35, 36, 39

Statutes:

Airport and Airway Development Act of 1970, 49 U.S.C. § § 1716(c)(1) and (3) 28, 29

Atomic Energy Act of 1954, 42 U.S.C. § 2133(a) 26

Federal Aid Highway Act of 1956, 23 U.S.C. § 106(a) 28

Federal Power Act, 16 U.S.C. § 803 26

Fire Island National Seashore Act, 16 U.S.C. § 459e *et seq.* 18

Housing Act of 1949, 42 U.S.C. § 1450 *et seq.* 27

Housing and Urban Development Act of 1968, 12 U.S.C. § 1715z-1(j)(5) 27

Interstate Commerce Act, 49 U.S.C. § 15(7) 35

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* 3, 14

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1702(a)(3) 2, 4

Page

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703(a) 2, 5, 7

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1705 ..... 2, 6

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1706(a) 2, 3, 6, 36

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1706(b) 2, 6, 7, 36

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1706(d) 2, 7, 36

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1716 ..... 2, 8, 25

National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* 3, 13

National Environmental Policy Act of 1969, 42 U.S.C. § § 4332(2)(C) -4335 ..... 2, 12, 13, 14, 15, 16, 19, 35, 37

Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3733(a) 29

Public Works and Economic Development Act of 1965, 42 U.S.C. § 3142(b) 27

Public Works and Economic Development Act Amendments of 1971, 42 U.S.C. § 3131(a) 29

Securities Act of 1933, 15 U.S.C. § 77a *et seq.* 4

Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501 *et seq.* 28

63 Okla. Stat. Ann. § § 1-909 & 1-910 32

25 U.S.C. § 415(a) (Indians) 25

28 U.S.C. § 1254(1) (Supreme Court Jurisdiction) 2

28 U.S.C. § 1331(a) (District Court Jurisdiction) 10

Page

Miscellaneous:

111 Cong. Rec. 27310-11 (1965) 4

113 Cong. Rec. 315-19 (1967) 4, 5

114 Cong. Rec. 15272 (1968) 9

H.R. 4314, 73d Cong., 1st Sess. (1933) 4

S. 875, 73d Cong., 1st Sess. (1933) 4

S. Rep. No. 1123, 90th Cong., 2d Sess. (1968) 8

S. Rep. No. 296, 91st Cong., 1st Sess. (1969) 14, 16

10 C.F.R. Part 50, Appendix D, Section D.3, 36 Fed. Reg. 18071 at pp. 18075-76 (September 9, 1971) 26

Council on Environmental Quality, Guidelines for the Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.6(c) 20, 23

Council on Environmental Quality, Guidelines for the Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.8 37

Council on Environmental Quality, Guidelines for the Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.9(f) 37

Council on Environmental Quality, Guidelines for the Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.11(b) 38

Scenic Rivers Association v. Lynn: The Effect of NEPA on the Interstate Land Sales Act, 124 U.Penn.L.Rev. 250 (1975) 31

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported at 520 F.2d 240 (10th Cir. 1975). The opinion of the District Court (Pet. App. 1b) is reported at 382 F. Supp. 69 (E.D. Okla. 1974).

JURISDICTION

The judgment of the Court of Appeals was entered 30 July 1975 (Pet. App. 15a). The petition for a writ of certiorari of Flint Ridge Development Company was filed 2 October 1975 and was granted on 8 December 1975 (A. 86-87). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved and the relevant provisions thereof are the National Environmental Policy Act of 1969, 42 U.S.C. §§4332(2)(C)–4335, and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1702(a)(3), 1703(a), 1705, 1706(a), (b) and (d) and 1716. These provisions are reprinted in the Appendix to this brief.

QUESTIONS PRESENTED

1. Whether there is "major Federal action[] significantly affecting the . . . environment" requiring an environmental impact statement under Section 102(2)

(C) of the National Environmental Policy Act in connection with the filing of an antifraud disclosure statement under the Interstate Land Sales Full Disclosure Act.

2. Whether the environmental impact statement requirement of the National Environmental Policy Act overrides Section 1706(a) of the Interstate Land Sales Full Disclosure Act which affirmatively authorizes interstate land sales 30 days after filing an antifraud disclosure statement complete and accurate on its face with the Department of Housing and Urban Development, when 30 days is not long enough to complete an environmental impact statement.

STATEMENT OF THE CASE

The ultimate question to be determined by the Court is whether the Department of Housing and Urban Development (HUD) must prepare an environmental impact statement with respect to Flint Ridge Development Company's (Flint Ridge) residential subdivision development located within the Illinois River Basin in northeastern Oklahoma, pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.*

The courts below determined that there was major Federal action significantly affecting the quality of the human environment requiring the preparation of an environmental impact statement by HUD pursuant to NEPA because of HUD's activities in connection with Flint Ridge's filing under the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. §1701 *et seq.*

When a developer is ready to sell lots through the means of interstate commerce, it must follow the filing

procedure set out in ILSA. It is important to note that ILSA specifically exempts from its provisions any lot on which a house is built or as to which the seller is obligated to build a house thereon within two years. ILSA §1702(a) (3).

Frequently a developer, prior to such filing and sales, has begun the development through such activities as site selection, financing and planning and it may have commenced the construction of utilities, roads and other common improvements in the development. In fact, under ILSA, a developer may complete the development in its entirety prior to filing with HUD.

ILSA was passed to eliminate fraud in interstate land sales. It is patterned directly after the Securities Act of 1933,[1] and thus reflects the philosophy of regulation-by-requiring-disclosure embodied in the Securities Act.[2]

[1]15 U.S.C. §77a *et seq. See* 111 Cong. Rec. 27310-11 (1965) (Remarks of Senator Williams introducing S.2672, the Interstate Land Sales Full Disclosure bill); 113 Cong. Rec. 315-16 (1967) (Remarks of Senator Williams reporting out of committee S.275, the Interstate Land Sales Full Disclosure bill). The Securities and Exchange Commission would have been entrusted with the administration of land sales disclosure under the original bills introduced in 1965 and 1967. *Id.*

[2]Although this philosophy of securities regulation, exemplified in the writing and thought of Louis D. Brandeis, in the end won out over the philosophy of *substantive government approval* of the quality of securities issues, the latter philosophy was the basis for the original 1933 bills providing for registration of securities. *See* H.R.4314 and S.875, 73d Cong., 1st Sess. (1933). Section 6 of H.R.4314, for example, provided that the Federal Trade Commission, which briefly administered the Securities Act of 1933, "... may revoke the registration of any security by entering an order to that effect, if upon examination ... it shall appear ... (e) that its or their affairs are in unsound condition or insolvent; or (f) that the enterprise or business of the issuer, or person, or the security is not based upon sound principles, and that the revocation is in the interest of the public welfare." These provisions do *not* appear in the Securities Act of 1933.

Prior to the enactment of ILSA, a few unscrupulous developers in the land development business perpetrated frauds upon purchasers. For example, purchasers later learned that it was impractical to place improvements on the property because of its topography or the property was inaccessible from existing roads; the title was not clear, or encumbrances, deed restrictions, or covenants were not disclosed; vital services were unavailable, or the developer never constructed, or indicated the true location of, improvements such as golf courses, swimming pools, or club houses that were shown in glowing brochures; and encumbrances were placed upon the property by the developer and were not paid or discharged resulting in purchasers losing their lots through foreclosure.[3] ILSA was passed to correct such abuses.

ILSA makes it unlawful to use the means or instruments of transportation or communication in interstate commerce or the mails to sell or lease non-exempt lots unless the developer has on file with HUD an "effective" statement of record and furnishes a property report to each purchaser prior to sale.[4] A property report is a condensed version of the relevant information in the statement of record. A developer files this statement of record, which includes a property report, approximately 30 days before he expects to begin sales of *non-exempt* lots. The statement of record and property report are antifraud disclosure documents including information such as the name and address of each person having an interest in the lots in the subdivision; a legal description of the subdivision, a

[3]These and other abuses were described in the remarks of Senator Williams, 113 Cong. Rec. 315-319 (1967).

[4]ILSA §1703(a).

statement as to the topography, and a map showing the lots and their relation to the existing roads; the condition of the title, including encumbrances, deed restrictions, and covenants; a statement on the present condition of access, the availability of public utilities, and the nature and estimated completion date of any improvements to be installed by the developer; and if a blanket encumbrance exists, a statement as to the consequences to the individual purchaser of a failure by the person bound, to fulfill the obligations thereunder.[5]

After the statement of record is filed with HUD, it is checked by the agency for accuracy and completeness on its face. While it is being checked by HUD, the developer may continue its development activities such as further construction of utilities, roads and other common improvements. The developer may even construct houses on lots and by doing so exempt such lots from the provisions of ILSA. The developer may also exempt lots by selling them to persons in the business of constructing houses on lots or to persons acquiring the lots for resale.

A statement of record becomes "effective" automatically 30 days after it is filed with HUD.[6] The developer may then begin sales provided it furnishes purchasers with property reports prior to sale.

The "effective" date of a statement of record can be suspended by HUD, but *only if* the statement of record appears to HUD to be ". . . on its face incomplete or inaccurate in any material respect. . . ."[7] For example, the effective date of a statement of record may be suspended if the developer fails to disclose whether or

[5] ILSA §1705.

[6] ILSA §1706(a).

[7] ILSA §1706(b).

not sewage disposal facilities will be available. If, however, the developer accurately discloses that sewage disposal facilities will *not* be available, the effective date of the statement of record *cannot* be suspended, nor could HUD require the developer to make such facilities available. The effective date of a statement of record remains suspended until only 30 days after the developer files the necessary corrections in its statement of record.[8] The legal effect of suspension of the effective date of a statement of record is to make it unlawful for the developer to begin sales.[9] Such suspension in no way prevents the developer from continuing its development activities. Further, such suspension in no way prohibits the developer from constructing and selling houses in the development.

A statement of record which is "in effect" may be suspended if it ". . . includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading. . . ."[10] For example, a statement of record "in effect" may be suspended if the developer has stated therein that sewage disposal facilities will be available but in fact they will not. The statement of record remains suspended until it has been amended, for example, to state that sewage disposal facilities will *not* be available. HUD has no authority to require the developer to make the sewage disposal facilities available. The legal effect of suspension of a statement of record is to make it unlawful for the developer to continue selling lots.[11] Such suspension in no way prevents the developer from continuing its

[8] ILSA §1706(b).

[9] ILSA §§1703(a) (1) and 1706(b).

[10] ILSA §1706(d).

[11] ILSA §§1703(a) (1) and 1706(d).

development activities. Further, such suspension in no way prohibits the developer from constructing and selling houses in the development.

Thus, under ILSA, HUD has limited power to stop sales from beginning or to halt sales in progress. This power only comes into play if the developer fails to make the required disclosure or commits a fraud. HUD has no discretion whatsoever to suspend a statement of record for any other reason.

ILSA does not require or even authorize HUD to make any decision about the merits of, much less give approval to, a subdivision:

> "The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not . . . be held to mean [HUD] has in any way passed upon the merits of, or given approval to, such subdivision."[12]

Indeed, Congress specifically intended that HUD's authority under ILSA be strictly limited to requiring disclosure to prevent fraud. Senate Report No. 1123, 90th Cong., 2d Sess. (1968) on ILSA states:

> "These requirements mean that the seller of undeveloped land covered by this title would be required to inform the purchaser not only of the desirable aspects but also of any undesirable aspects. The purchaser will then be better able to make an intelligent decision. This proposal does not authorize the Federal Government to pass upon the quality of what is being sold or upon such questions as land value, land use, or zoning. Its purpose is to give the purchaser the information necessary to make his own determination of the quality of what is being sold."[13]

[12] ILSA §1716.

[13] Senate Report No. 1123 at 110.

This legislative intent was echoed by Senator Williams, the chief sponsor of ILSA, when he said in the Congressional debates:

> "It is not a regulatory statute which will permit the Federal Government to pass upon such questions as land value, its selling price, land use, or zoning. The only purpose of this legislation is to give the purchaser the necessary information upon which he can make his own investment decision."[14]

HUD has no authority under ILSA to fund a development or to participate in its planning or construction.

Petitioner Flint Ridge is a private joint venture organized to develop and sell lots in a subdivision located in northeastern Oklahoma.

In May 1973, after site selection, financing and planning, Flint Ridge commenced construction of utilities, roads and other common improvements (R. 533).

On 5 February 1974, Flint Ridge filed its statement of record with HUD. Within 30 days, on 22 February 1974, HUD notified Flint Ridge that its statement of record was incomplete and inaccurate on its face and suspended its effective date. On 2 May 1974, after filing its corrections, Flint Ridge's statement of record became effective. Sales of lots commenced immediately and continued uninterrupted until the action of the District Court on 4 September 1974 when more than three and one-half million dollars had been spent on the development (R. 540). On the effective date of the statement of record the development was in varying

[14] 114 Cong. Rec. 15272 (1968).

degrees of completion. For example, the Community Center Clubhouse and the roads were respectively 100% and 50% complete (Pl. Ex. 1; R. 859, 391-392).

Respondents, environmental groups, in February 1974, filed a demand on HUD that prior to "approval" of Flint Ridge's statement of record, HUD was required to prepare an environmental impact statement on the development. In March 1974 HUD determined that an environmental impact statement was not required because its checking of a statement of record and requiring correction thereof was not a major Federal action significantly affecting the environment.

Respondents (Scenic Rivers) filed a complaint on 21 April 1974, and several amendments thereafter, in the District Court. Among other things, the respondents sought an injunction against any further development activities by Flint Ridge and sought to enjoin HUD from "approving" Flint Ridge's statement of record until HUD prepared an environmental impact statement. The District Court concluded that it had jurisdiction, apparently under 28 U.S.C. §1331(a).

On 4 September 1974 the District Court suspended Flint Ridge's statement of record, prohibited public sale of lots thereunder, and enjoined HUD from "approving" the statement of record until HUD prepared an environmental impact statement. The District Court did not find, however, that the Flint Ridge statement of record that became effective on 2 May 1974 was incomplete, inaccurate or fraudulent. Further, the District Court did not enjoin Flint Ridge from any further development activities on the project. Scenic Rivers did not file a cross-appeal from this portion of the District Court opinion.

The Court of Appeals affirmed in pertinent part on the ground that "major federal action significantly affecting the . . . environment was present" because of "the consequences of the government's approval of the statement [of record] in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses. . . ." (Pet. App. 9a). The Court of Appeals also found that there was no conflict between the ILSA provision which automatically authorizes sales 30 days after filing or correction of a statement of record and the environmental impact statement requirement of NEPA, which concededly could not be satisfied in 30 days, because "[t]here is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement." (Pet. App. 9a).

SUMMARY OF ARGUMENT

The Flint Ridge Development is an entirely privately planned, funded and constructed residential housing development. Flint Ridge filed a statement of record with HUD pursuant to the Interstate Land Sales Full Disclosure Act (ILSA). HUD checked this antifraud disclosure document solely for completeness and accuracy on its face, suspended the statement of record until certain corrections were made, and then made it effective within 30 days after the filing of a corrected statement. This was the only Federal action relating to the Flint Ridge Development.

The National Environmental Policy Act (NEPA), Section 102(2)(C), requires the preparation of an environmental impact statement for agency proposals for major Federal actions significantly affecting the environment. HUD, under ILSA, is limited to checking the completeness and accuracy of the disclosure document and has no authority whatsoever over the private development activities that affect the environment. HUD is without power to even prevent or condition those acts which may affect the environment. Therefore, HUD did not undertake a major Federal action significantly affecting the environment.

ILSA provides that a statement of record which is complete and accurate on its face automatically becomes effective 30 days after it is filed. The preparation of an environmental impact statement under the standards and procedures in Section 102(2)(C) of NEPA cannot be completed in 30 days. One of the statutory provisions has to give way. The Court has said that Section 102(2)(C) of NEPA does not sub silentio amend or repeal by implication any other Federal statute. Therefore, the statutory scheme of ILSA must prevail.

ARGUMENT

I.

HUD DID NOT UNDERTAKE A "MAJOR FEDERAL ACTION[] SIGNIFICANTLY AFFECTING THE . . . ENVIRONMENT" REQUIRING PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT UNDER SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT BECAUSE HUD'S AUTHORITY WAS STRICTLY LIMITED TO CHECKING AND REQUIRING CORRECTION OF FLINT RIDGE'S ANTIFRAUD DISCLOSURE DOCUMENT FILED PURSUANT TO THE INTERSTATE LAND SALES FULL DISCLOSURE ACT AND HUD DID NOT, AND HAD NO AUTHORITY TO, PARTICIPATE IN THE PLANNING, FINANCING, OR CONSTRUCTION, OR, TO AUTHORIZE, PERMIT, OR APPROVE THE FLINT RIDGE DEVELOPMENT.

Although the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, as a whole applies to all Federal agencies, "major Federal actions significantly affecting the . . . environment" is the threshold that must be met before the written environmental impact statement requirement of Section 102(2)(C) of NEPA is *triggered* with respect to a proposed Federal agency action.[15]

[15] This case does not involve the question of whether any of the other provisions of NEPA apply to HUD in its administration of ILSA. Under the authority of ILSA and NEPA, HUD could, for example, initiate a rulemaking proceeding to require environmental disclosure in statements of record. *See* Natural Resources Defense Council v. SEC, 389 F. Supp. 689 (D. D.C. 1974). Scenic Rivers requested no such relief from HUD or from the District Court.

The Flint Ridge Development is an entirely privately planned, funded, and constructed residential housing development in northeastern Oklahoma. The only Federal action taken with respect to the Flint Ridge Development was HUD's checking and requiring correction of an antifraud disclosure document, called a statement of record, filed under the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. §1701 *et seq.* HUD had no responsibility for or control over the private development activities of Flint Ridge that affect the environment. The development activities of Flint Ridge that affected the environment occurred and continued independent of any HUD action.

A. Where The Federal Agency Has No Responsibility For Or Control Over The Activities Of A Private Party That Affect The Environment Because The Federal Agency Has No Discretion Under Its Organic Statute To Halt Or To Modify The Scope Of Such Activities, There Is No Major Federal Action Significantly Affecting The Environment.

One of the principal goals of NEPA was to "provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment."[16] A careful reading of Section 102(2)(C) of NEPA shows that Congress intended to make the Federal government act responsibly whenever it *"proposed"* to take major

[16]Comm. on Interior & Insular Affairs, Report on National Environmental Policy Act of 1969, S. Rep. No. 296, 91st Cong., 1st Sess. 14 (1969).

action having an effect on the environment. Section 102(2)(C) of NEPA provides in pertinent part:

> "The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall–
>
> * * *
>
> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

The principle implicit in the above statutory language is that the Federal government act responsibly toward the environment *when and only when it has the discretion to act.* The preparation of an environmental impact statement was designed primarily as a procedure to influence the Federal government when it had discretion in its choice of actions, or inaction. The whole concept of Federal responsibility toward the environment rests, indeed, on the implied premise that the government agency has a choice under its organic statute in whether to act or not, or in the scope of its action, with respect to the environment. To require the

preparation of an environmental impact statement when the Federal government has no discretion over actions which affect the environment is to make the Section 102(2)(C) requirement an empty ritual, without meaning or purpose.

Put more broadly, Section 102(2)(C) of NEPA insures that the responsibility of Federal agencies to consider the consequences of their actions on the environment will be carried out with respect to the major Federal actions that significantly affect the environment. This is accomplished by requiring the Federal agency to give *written* consideration of the environmental consequences of those actions and to do so at the time they "propose" such action.[17] Furthermore, the environmental impact statement must "...accompany the proposal through the existing agency review processes" and be made available to the President, the Council on Environmental Quality, and the public, thus insuring such consideration. This "action-forcing" provision thus "contribute[s] to a more orderly, rational and constructive Federal response to *environmental decisionmaking*...."[18]

[17]Aberdeen and Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP II), 422 U.S. 289, 319 (1975).

[18]Comm. on Interior & Insular Affairs, Report on National Environmental Policy Act of 1969, S. Rep. No. 296, 91st Cong., 1st Sess. 9 (1969) (Emphasis supplied). *See also*, City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) where the court stated at 670:

> "[NEPA] requires federal agencies contemplating major action to follow a procedure—preparing and considering an EIS whenever the proposed action may significantly affect the quality of the human environment.... Failing to follow this procedure creates a risk that serious and avoidable environmental consequences of the action, which an EIS would reveal, will not be brought to the attention of agency *decisionmakers*. Thus, if a particular project does in fact entail serious but nonobvious environmental impacts, agency failure to prepare an EIS may mean that the last opportunity to *eliminate* or *minimize* these impacts, in accordance with NEPA's broad objectives, has been lost." (Emphasis supplied and footnote omitted).

The written environmental impact statement requirement thus insures consideration of the consequences of Federal actions on the environment when it is used by a Federal agency to decide, for example, whether (1) to construct a large Federal project, such as a flood control dam,[19] (2) to provide Federal funds for a non-Federal project that conforms to the statutory requirement for Federal funding, such as the funding of a non-Federal penal facility,[20] or (3) to permit or prevent a private party from taking a major action significantly affecting the environment in circumstances where Federal approval is a prerequisite to the action in question, such as Federal approval for a utility to construct a primary transmission line.[21]

In this case, however, HUD had no authority under ILSA to take action itself that would affect the environment. HUD had no authority to provide funds to a private party to be used to affect the environment. HUD had no "go-ahead"[22] or "stop" power over the

[19]*See e.g.*, Environmental Defense Fund v. Corps of Engineers, 470 F. 2d 289 (8th Cir. 1972) (*en banc*).

[20]*See e.g.*, Ely v. Velde, 451 F. 2d 1130 (4th Cir. 1971).

[21]*See e.g.*, Greene County Planning Board v. FPC, 455 F. 2d 412 (2d Cir. 1972).

[22]In Biderman v. Morton, 497 F. 2d 1141 (2d Cir. 1974), the Second Circuit affirmed the denial of a preliminary injunction against non-Federal parties pending completion by the Secretary

private development activities of Flint Ridge that affected the government. HUD's authority under ILSA is limited to the four corners of an antifraud disclosure document. Moreover, HUD cannot even suspend a statement of record which meets the disclosure requirements no matter what the eventual impact of the development may be on the environment. In this case,

Note 22 – *Continued*

of Interior of an environmental impact statement on the grounds that the Federal government had no "go-ahead" power over the non-Federal actions sought to be enjoined. *Biderman* involved the Fire Island National Seashore Act, 16 U.S.C. §459e *et seq.*, which was passed to conserve and preserve the natural beauty of Fire Island. The Secretary, however, was empowered only to condemn unimproved privately-owned property and improved property zoned in an unsatisfactory manner. Plaintiffs, residents of Fire Island, sought to enjoin *local* officials from issuing zoning permits and variances until the Secretary had completed an environmental impact statement. The court pointed out that the non-Federal parties were not in partnership with, or the recipient of funds from, the Federal government and concluded that injunctive relief against the non-Federal parties was unwarranted because:

> "... [This is not] a case in which non-federal action [the zoning decisions of the Seashore municipalities] cannot lawfully begin or continue without the prior approval of a federal agency."
>
> *Id.* 1147."
>
> "We simply cannot, by granting injunctive relief, arm the Secretary with 'go-ahead' power when Congress ... saw fit not to do so."
>
> *Id.* 1148.

HUD simply had no *decision* to make regarding its activities or Flint Ridge's independent private development activities that affected the environment. To require HUD to prepare a written environmental impact statement in a situation where it has no decision to make which involves a choice of actions affecting the environment is to make the Section 102(2)(C) requirement an empty ritual without meaning or purpose. If the decision of the Tenth Circuit stands this empty ritual might have to be repeated by HUD 7,000 separate times, imposing a crushing administrative burden. This is apart from the implication of the decision for the Securities and Exchange Commission and the nation's private capital markets.[23]

B. HUD's Action Under ILSA Does Not Constitute "Major Federal Action[] Significantly Affecting The ... Environment" Under Any Of The Tests Adopted To Date.

In the five years since the enactment of NEPA, there has been no agreement as to a test for determining either what does or what does not constitute "major Federal action[] significantly affecting the ... environment."

In *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), *cert. denied.*, 409 U.S. 990 (1972), which involved the construction of a Federal prison facility in New York City, the Second Circuit announced a two-step test that requires the preparation of an environmental impact

[23] Petition of Solicitor General at 7; *See also Id.* at 7-9 and Petition of Flint Ridge at 17-19.

statement when the Federal action is both (1) major and (2) results in a significant effect on the environment.

The Council on Environmental Quality (CEQ), created by Title II of NEPA, has adopted a like concept:

> "The action must be a (1) 'major' action, (2) which is a 'Federal action,' (3) which has a 'significant' effect, *and* (4) which involves the 'quality of the human environment.' "[24]

The CEQ has explained:

> "The words 'major' and 'significantly' are intended to imply *thresholds* of importance and impact that must be met before a statement is required."[25]

The CEQ Guidelines, like *Hanly*, require an inquiry into the scope of the Federal action to determine whether it is "major." The Guidelines also make it clear, however, that the "*Federal* action" must "involve[] the 'quality of the human environment' " In addition, the CEQ Guidelines point out that "[t]he action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute 'Federal action' in contrast to cases where such Federal control and responsibility are not present. . . ."[26]

In *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974) *(en banc)*, which involved private logging operations carried out pursuant to U.S. Forest Service contracts for timber sales in a

[24]Council on Environmental Quality, Guidelines for the Preparation of Environmental Impact Statements, 40, C.F.R. §1500.6(c) (Emphasis supplied).

[25]*Id.* (Emphasis supplied).

[26]*Id.* (Emphasis supplied).

designated wilderness area,[27] the Eighth Circuit announced a single test for determining whether a written environmental impact statement is required:

> "To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act. . . . By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact on the environment."[28]

In *National Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir. 1973), the Ninth Circuit announced

[27]In commenting on the Federal actions under review in *Minnesota PIRG*, the court noted that:

> "The Forest Service has been significantly involved with these timber sales since January 1, 1970, the effective date of NEPA. Its contracts require it to, *inter alia*, approve locations of timber roads, logging camps and buildings; mark the trees to be cut; and negotiate payment for the timber cut. In addition, it extended six of the sales after the effective date of NEPA and made contract modifications with the consent of the purchasers on seven of the sales
>
> "Further, there is a monetary involvement. The District Court found that the revenue the Forest Service receives from its timber sales in the BWCA is clearly inadequate to finance the reforestation program required after the mature timber is cut. This financial involvement is properly considered when determining the significance of Forest Service participation."
>
> 498 F. 2d at 1322-23.

[28]498 F.2d at 1321-22.

a "but for" test for determining whether an environmental impact statement is required.[29] The U.S. Forest Service exchanged government land in the Gallatin National Forest for lands of Burlington Northern located within and adjacent to the Forest and within Yellowstone National Park. A part of the land acquired by Burlington Northern in the exchange was to be immediately conveyed to Big Sky of Montana, Inc. for a proposed recreational development. In concluding that a written environmental impact statement was required, the court said:

> "We do not 'doubt' that NEPA applies to this massive land exchange. While the federal defendants are not themselves planning to take action 'significantly affecting the quality of the human environment,' 42 U.S.C. §4332(C), *the private defendants plan such action and the exchange is an act without which such action could not be taken.*"[30]

[29]The "but for" test is often an appropriate way to determine whether there is major Federal action significantly affecting the environment in cases where the direct Federal action is small but is a condition precedent to a large "secondary impact" caused by independent private action. This is because "but for" the small Federal action a large environmental impact would not occur. *See, e.g.* City of Davis v. Coleman, 521 F. 2d 661 (9th Cir. 1975); Scientists' Institute for Public Information (SIPI) v. AEC, 481 F.2d 1079 (D.C. Cir. 1973). These are different from the instant case, however, in at least two ways. First, in secondary impact cases, the Federal agency has complete discretion over whether or not to take the initial Federal action, be it building a highway interchange (*Davis*) or embarking on a nuclear power research and development project (*SIPI*). HUD, however, has no such discretion under ILSA because it cannot even suspend the effective date of a statement of record, or the statement of record itself, if the developer makes the required disclosure and does not commit fraud. Second, in secondary impact cases, the Federal agency action precedes and would directly cause the resulting private secondary impact. Here, however, the development of the Flint Ridge subdivision lawfully preceded and continued independently of both the filing of its statement of record *and* HUD's checking of this statement of record for completeness and accuracy.

If the Federal action must be "major," as set forth in *Hanly* and the CEQ Guidelines, and if that term is to have any meaning with respect to the *magnitude* of Federal involvement in the activities of a private party that affect the environment, then "major" must mean substantially more Federal involvement than that confined to the four corners of an antifraud disclosure document in the context of a wholly privately planned, funded, and constructed land development.

In addition, in this case, the Federal action by HUD does not, in the words of the CEQ Guidelines and as *Hanly* provides, "involve[] the 'quality of the human environment.'" HUD's actions do not either directly or indirectly affect the environment.

If, as required by *Minnesota PIRG*, the determining factor is whether the Federal action has a significant effect on the environment, regardless of whether that Federal action is "major," this test as well as the second step of the *Hanly* test are not met because the checking of the statement of record is independent of and does not cause or permit the private development actions that affect the environment.

Nor would the "but for" test in *National Forest Preservation Group* require HUD to prepare an environmental impact statement on the Flint Ridge subdivision since the development activities began long prior to the filing of the statement of record with HUD and HUD had no statutory "go-ahead" or stop power

[30]485 F. 2d at 411.

over the development before or after the statement of record became effective.

Therefore, even assuming *arguendo* that Flint Ridge took action "significantly affecting the quality of the human environment," HUD's checking and requiring correction of the statement of record was not an act without which Flint Ridge's private activities affecting the environment could be either undertaken or completed.

C. None Of The Cases Relied Upon By The Court Below Support Its Conclusion That HUD Undertook Major Federal Action Significantly Affecting The Environment Because, In Contrast To ILSA, The Organic Statutes Involved In Each Of Those Cases Provided For Federal Control Over, Involvement In, Or Approval And Funding Of The Activities Of Private Parties That Affected The Environment.

The Tenth Circuit based its conclusion that there was major Federal action affecting the environment on three lines of cases which involved matters said to be "*similar* to that here presented," a condition "*not far different* from ours," and an "*analogy*." (Pet. App. 6a, 8a). Each of the organic statutes governing the Federal agency action involved in those cases, however, provided explicitly for Federal control over, involvement in, or funding of the project in question. They stand in stark contrast to ILSA, which gives HUD no such authority.

The principal case relied upon by the Tenth Circuit and said by that court to be very similar to the instant case is *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), litigation involving a lease by a private person of

"restricted" Indian lands requiring the approval of the Secretary of the Interior. The Tenth Circuit said:

> "The similarity between our case and *Davis* is that both involve filing and *approval* of private action."[31]

Congress, however, made it clear in ILSA that HUD's actions thereunder should not even be construed as "approval" of a statement of record, let alone as approval of the private actions of a developer that may affect the environment:

> "The fact that a statement of record with respect to a subdivision has been filed or is in effect *shall not be* deemed a finding by the Secretary that the statement of record is true and accurate on its face, *or be held to mean* the Secretary has in any way passed upon the merits of or given approval to, such subdivision."[32]

In contrast to the absence of power to "approve" in the case at bar, the relevant portion of the organic statute involved in *Davis* provides:

> "Any restricted Indian lands . . . may be leased by the Indian owners, with the *approval* of the Secretary of the Interior . . . and all leases and renewals shall be made under such *terms and regulations as may be prescribed* by the Secretary of the Interior."[33]

The court below noted that *Davis* cited with approval *Greene County Planning Board v. FPC*, 455 F.2d 412 (2d Cir. 1972), and *Izaak Walton League of America v. Schlesinger*, 337 F.Supp. 287 (D. D.C. 1971). Neither

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[31]Pet. App. 7a (Emphasis supplied).

[32]ILSA §1716 (Emphasis supplied).

[33]25 U.S.C. §415(a) (Emphasis supplied).

of these decisions involved circumstances apposite to the HUD review procedure.[34]

The court below also relied upon ten cases as either providing an "analogy" or as involving conditions said to be "not far different from ours." However, in one of the ten cases, for example, *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973), the Ninth Circuit described the organic statute involved as follows:

> "The provisions of the Housing Act of 1949, 42 U.S.C. §1450 et seq., . . . enable basically a contractual relationship between a locality and HUD. . . . *A loan or a grant, or both,* may be made from the federal government to the locality. The Secretary may establish reasonable requirements for the program which must be complied with prior to the entering into [sic] a contract with the locality. These requirements operate as conditions precedent to the formation of the contract. §1453. . . . This statutory scheme thus provides for local adoption of a plan, *adjustment of the plan to meet HUD requirements and finally entry into an enforceable contractual relationship with HUD.*"[35]

Moreover, in each of those ten cases[36] relied upon by the court below, the Federal agency (1) had power to

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[34]The organic statute in *Greene County*, the Federal Power Act, provides in pertinent part:

> "[a]ll licenses issued . . . shall be on the following conditions: (a) That the project adopted . . . shall be such as in the **judgment of the Commission** will be best adapted to a comprehensive plan . . . and if necessary . . . **the Commission shall have authority to require the modification of any project . . . before approval.**"

16 U.S.C. § 803 (Emphasis supplied).

The organic statute involved in *Schlesinger*, the Atomic Energy Act of 1954, provides in pertinent part:

> "[s]uch licenses [construction of nuclear reactors] shall be issued . . . **subject to such conditions as the Commission may by rule or regulation establish** . . . ."

42 U.S.C. § 2133(a) (Emphasis supplied).

The regulation in dispute in *Schlesinger*, 10 C.F.R. Part 50, Appendix D, Section D.3, 36 Fed. Reg. 18071 at pp. 18075-76 (September 9, 1971), provides in pertinent part:

> ". . . the Commission may issue a license for limited operation after **consideration and balancing** of the factors . . . and upon making the appropriate findings on the matters specified . . . ."

(Emphasis supplied).

[35]472 F. 2d at 1023, n. 1 (Emphasis supplied).

[36]The organic statute in Proetta v. Dent, 484 F. 2d 1146 (2d Cir. 1973), the Public Works and Economic Development Act of 1965, in pertinent part provides:

> "[f]inancial assistance under this section shall be on such **terms and conditions** as the **Secretary determines** . . . ."

42 U.S.C. §3142(b) (Emphasis supplied).

The organic statute in Jones v. Lynn, 477 F. 2d 885 (1st Cir. 1973), is the Housing Act of 1949 discussed under San Francisco v. Romney, *supra*.

The organic statute in Silva v. Romney, 473 F. 2d 287 (1st Cir. 1973) and in Silva v. Lynn, 482 F. 2d 1282 (1st Cir. 1973), the Housing and Urban Development Act of 1968, in pertinent part provides:

> "[t]he property or project shall—(A) comply with such **standards and conditions** as the **Secretary** may **prescribe** to establish the acceptability of the property for mortgage insurance . . . ."

12 U.S.C. §1715z-1(j) (5) (Emphasis supplied).

The organic statute involved in Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974), concerning a HUD guarantee of debt

provide Federal financial assistance to non-Federal persons to be used by them to conduct activities which affect the environment and (2) had statutory authority to exercise discretion in approving or conditioning that

Note 36 – *Continued*

obligations, is the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. §4501 *et seq.*, and was described by the court as follows:

> "After a developer has successfully traversed the application process and accepted an offer of commitment, the **terms and conditions** under which he must operate are **negotiated with HUD and executed in a project agreement**. A trust indenture and a development plan are required and must set out . . . (iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, ars [sic] enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in any part of the development plan require **approval by the Secretary**."

502 F. 2d at 53 (Emphasis supplied).

In Monroe County Conservation Council, Inc. v. Volpe, 472 F. 2d 693, 695-96 (2d Cir. 1972), the State of New York sought " . . . to construct the highway under the Federal Aid Highway Program, 23 U.S.C. §101 et seq., with 60% federal financial reimbursement." That Act in pertinent part provides for:

> " . . . **approval** [by the Secretary of Commerce of] **surveys, plans, specifications** and **estimates** [of proposed highway projects]."

23 U.S.C. §106(a) (Emphasis supplied).

In City of Boston v. Volpe, 464 F. 2d 254 (1st Cir., 1972), the Massachusetts Port Authority was seeking Federal funding for airport development and the organic statute, the Airport and Airway Development Act of 1970, in pertinent part provides:

> "[a]ll airport development projects shall be subject to the **approval of the Secretary**, which **approval** may be given only if he is **satisfied** that . . . [and] [n]o airport development project may be **approved** by the Secretary unless **he is**

financial assistance. Under ILSA, however, HUD has no power to provide financial assistance to a development and no discretion to approve or condition either the effectiveness of a statement of record or those activities

Note 36 – *Continued*

> **satisfied** that fair consideration has been given to the interest of communities in or near which the project may be located."

49 U.S.C. §§1716(c) (1) and (3) (Emphasis supplied).

The organic statute in Upper Pecos Association v. Stans, 452 F. 2d 1233 (10th Cir. 1971), vacated and remanded to determine mootness, 409 U.S. 1021 (1972), the Public Works and Economic Development Act Amendments of 1971, in pertinent part provides that the Secretary of Commerce is authorized to make grants

> " . . . **if he finds** that –(A) the project for which **financial assistance** is sought will directly or indirectly . . . primarily benefit the long-term unemployed and members of low-income families or otherwise substantially further the objectives of the Economic Opportunity Act of 1964 . . . ."

42 U.S.C. §3131(a) (Emphasis supplied).

The organic statute in Ely v. Velde, 451 F. 2d 1130 (4th Cir. 1971), the Omnibus Crime Control and Safe Streets Act of 1968, in pertinent part provides that:

> "[t]he Administration shall make **grants** . . . [for an] **approved** comprehensive State plan . . . No state plan shall be **approved** as comprehensive **unless the Administration finds** that the plan provides for the allocation of adequate assistance to deal with law enforcement . . . ."

42 U.S.C. §3733(a) (Emphasis supplied).

Despite the Federal agency's argument that it had no discretion but to provide the funds, the court found that the agency could impose conditions on the making of a grant. 451 F. 2d at 1135 and 1137.

of a private developer that may affect the environment. In fact, all the funds necessary for the development of Flint Ridge were obtained from private sources, were secured long prior to any Federal action by HUD (Pl. Ex. 1, R. 872, 912, 919, 391-92), and were secured without any prior or subsequent Federal approval of either their procurement or use. The Federal control that forms the predicate for major Federal action affecting the environment in the ten cases relied upon by the court below—namely, a discretionary hand on the purse strings—simply does not exist under ILSA.

D. The Conclusion Of The Court Below That HUD Undertook A Major Federal Action Significantly Affecting The Environment Rests Upon A Fundamental Misunderstanding Of The Operation And Scope Of The Interstate Land Sales Full Disclosure Act.

The court below erroneously found major Federal action by HUD on the assumed existence of an unlimited HUD suspension power:

> "... [HUD has] the authority to suspend a statement, the effect of which is to *cut off raising funds in interstate which* would be otherwise available. Thus, *this allows the Federal Government to suspend a private action which would unquestionably affect the environment.*"[37]

HUD's power to suspend a statement of record or its effective date, however, *only* arises when a statement of record appears to be, on its face, incomplete or

[37]Pet. App. 6a (Emphasis supplied).

inaccurate in any material respect or is fraudulent. The statement of record must become effective within 30 days after the necessary corrections are made by the developer. If a developer makes the required disclosure, HUD has no power whatsoever to suspend the statement of record, no matter what the eventual impact on the environment. Furthermore, at no time did Scenic Rivers allege or the courts below find that the statement of record of Flint Ridge was on its face incomplete or inaccurate or fraudulent.[38]

The court below also suggests that the HUD nexus is a critical step to funding the environmental effect, thus finding that there is Federal action affecting the environment:

> "The result of approval here is that the developer is free to seek funds in commerce for the development. In each instance [here and in *Davis*] the filing is a preliminary step which is followed by substantial consequences to the environment;

[38]The reasoning of the Tenth Circuit was also criticized in *Scenic Rivers Association v. Lynn: The Effect Of NEPA on the Interstate Land Sales Act*, 124 U.Penn.L.Rev. 250, 259 (1975) where it states:

> "If HUD lacks authority to affect the environmental consequences of a development, it cannot be considered responsible for that development's adverse environmental impact. Because HUD's disapproval of the ILSA statement would hinder or prevent the development project, it might be viewed as a remote link in a chain of causation; but if HUD cannot disapprove an accurate statement even this causation theory fails. To hold, as *Scenic Rivers* seems to have done, that any such federal contact is automatically major federal action is to expand the scope of NEPA far beyond what was contemplated even in the *Davis* (discretionary authority) case. Both the district and appellate decisions in *Scenic Rivers* ignore the lack of federal power over the environmental consequences of the proposed development and in effect construe the word 'major' out of NEPA. *Scenic Rivers* should not have required an impact statement." (Footnotes omitted).

thus, there is action which leads to the development which in turn affects the human environment."[39]

The failure of this reasoning of the court below (and another difference between the instant case and *Davis*) lies in both the timing and the cause-effect relationship between governmental action on the one hand and private action on the other. In *Davis*, but for the Secretary's *approval* of the leases, no private action affecting the environment could have even begun. In the case at bar, however, it is undisputed that after the site selection, acquisition, planning, and securing of funds for development, the actual construction of the Flint Ridge development began in May 1973 (R. 533). Flint Ridge filed its statement of record in February 1974 (R. 691). Therefore, the Federal action of HUD was not a preliminary step and was not followed by, and thus did not cause, consequences to the environment. Indeed, the private actions of Flint Ridge which affected the environment lawfully preceded any Federal action by HUD. Consequently, there is simply no Federal action which "leads to the development which in turn affects the human environment."

The decision also fails to recognize where HUD's authority stops under ILSA and the authority of State law takes over. For example, the Tenth Circuit relied upon a finding by the District Court that septic tanks in the development were discharging sewage into the Illinois River.[40] The Oklahoma State Department of Health regulates septic tanks and has statutory authority to prohibit pollution therefrom.[41] The

[39]Pet. App. 7a.

[40]This finding was not appealed *only* because Flint Ridge maintains that it is irrelevant to the issues.

[41]63 Okla. Stat. Ann. §§1-909 & 1-910.

Commissioner of the State Department of Health and two registered, professional sanitarians employed by the State Department of Health testified that the use of septic tanks in the Flint Ridge Development was approved by the State Department of Health and would not pollute the Illinois River and this testimony was based on percolation tests of the land in the development (A. 66-69, 71-75). The only conceivable basis for the District Court's finding was the nonexpert opinion testimony of Scenic Rivers' witnesses, Jerry Overton and Thomas Aley. Overton, a grduate student in geography, offered his opinion, based on a study he made of the Illinois River Basin, that effluent from septic tanks in the development would flow into tributaries and in some cases into the Illinois River almost as primary sewage (R. 59). On cross-examination, however, Overton admitted that his study did not even include a determination of the type of soil found in Delaware County, Oklahoma, in which the development is located (A. 13). Aley, a hydrologist, testified to the same effect on the basis of an experimental test he conducted on one septic tank located in Doniphan, Missouri, approximately 250 miles from Flint Ridge, where according to Aley, the soil conditions were greatly similar (A. 44-46). On cross-examination, Aley admitted that although he had read some unidentified soil reports he did not conduct any soil analysis in the Flint Ridge area (A. 45-46) and made no inquiry as to the type of septic tanks to be used in the development (A. 46-47). This testimony piles presumption upon presumption to reach the dizzying heights of pure speculation.

The finding by the District Court is tantamount to concluding that the responsible officials of the State of Oklahoma ignore or are incompetent to enforce the laws of that State. Furthermore, neither of Scenic Rivers' witnesses testified that HUD had anything whatsoever to do with the septic tanks in the development. If the holding of the court below is allowed to stand, HUD will be forced by the courts into the business of passing on the environmental merits of developments and second-guessing the responsible officials in every state in the union.

II.

THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE ANNOUNCED IN SCRAP I THAT NEPA DOES NOT SUB SILENTIO AMEND OR REPEAL BY IMPLICATION ANY OTHER STATUTE BECAUSE NOTWITHSTANDING THAT ILSA MAKES FILINGS THEREUNDER AUTOMATICALLY EFFECTIVE IN 30 DAYS AND AUTHORIZES SUSPENSION OF FILINGS ONLY FOR INCOMPLETENESS OR INACCURACY ON THEIR FACE OR FOR FRAUD, THE DECISION BELOW SUSPENDED FLINT RIDGE'S FILING INDEFINITELY BEYOND THE 30 DAYS SOLELY TO GIVE HUD TIME TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT.

In *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP I), 412 U.S. 669 (1973), the Court faced the question of whether NEPA sub

silentio amended or repealed by implication Section 15(7) of the Interstate Commerce Act. The District Court in SCRAP I found that NEPA empowered it to enjoin the Interstate Commerce Commission (ICC) from permitting, and the railroads from collecting, an interim surcharge on recyclable goods, notwithstanding the holding in *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963), that Section 15(7) vested the sole and exclusive power to temporarily enjoin collection of rates in the ICC and withdrew such power from the judiciary. The injunction was issued on the ground that the ICC orders refusing to suspend the surcharge were unlawful under Section 102(2)(C) of NEPA because they constituted major Federal action significantly affecting the environment for which the ICC had not prepared a written environmental impact statement. The Court concluded that NEPA did not repeal by implication Section 15(7) of the Interstate Commerce Act:

> "The statutory language, in fact, indicates that *NEPA was not intended to repeal by implication any other statute.* Thus, 42 U.S.C. §4335 specifies that '[t]he policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal gencies,' and 42 U.S.C. §4334 instructs that the Act 'shall [not] in any way affect the specific statutory obligations of any Federal agency. . . .' Rather than providing for any wholesale overruling of prior law, NEPA requires all federal agencies to review their 'present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of

> [NEPA] and shall propose to the President . . . such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in [NEPA].' 42 U.S.C. §4333. It would be anomalous if Congress had provided at one and the same time that federal agencies, which have the primary responsibility for the implementation of NEPA, must comply with present law and ask for any necessary new legislation, but that the courts may simply ignore what we described in *Arrow* as 'a clear congressional purpose to oust judicial power. . . .' "[42]

ILSA is a carefully devised statutory scheme to prevent fraud without imposing stifling regulatory burdens on the economically important business of interstate land sales. The statutory scheme is a simple one. The developer must file an antifraud disclosure document called a statement of record with HUD. Section 1706(a) of ILSA provides for a statement of record to *automatically* become "effective" 30 days after filing and the developer may then begin sales. Under Section 1706(b), the effective date of a developer's statement of record can be suspended *only* on the ground that the statement of record appears to HUD to be ". . . on its face incomplete or inaccurate in any material respect. . . ." In that event, the effective date is suspended only until 30 days after the developer files the necessary corrections in its statement of record. Under Section 1706(d), an effective statement of record can be suspended only if it contains an untrue statement of material fact or omits a material fact. In that event, the statement of record remains

[42]412 U.S. at 694-95 (Emphasis supplied and footnote omitted).

suspended only until the developer files the necessary corrections. The effect of suspension is to stop sales from beginning or halt sales in progress. The power of HUD to suspend, therefore, comes into play *only* if the *developer* fails to make the required disclosure—and not because of anything HUD either does or fails to do. HUD has no discretion to suspend a statement of record for any other reason.[43] ILSA neither requires nor allows HUD to make any judgment about the merits of the underlying development. Congress thus devised a statutory scheme that gives HUD suspension power to prevent fraud but erects a barrier against any *Government caused delay* beyond the initial 30-day period.

It is undisputed that an environmental impact statement under NEPA cannot be completed in 30 days. First, collection of the sheer mass of information and data required and the analysis thereof requires substantially more than 30 days.[44] Second, preparation of an environmental impact statement in accordance with the CEQ Guidelines requires that when the draft environmental impact statement is prepared, other Federal agencies be given not less than 45 days to comment.[45] Third, when the final environmental impact statement is prepared the CEQ Guidelines provide that the agency shall not take action until 30

[43]This clear statutory limitation on the suspension power of HUD was ignored by the court below when it stated that:

> "There is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement." (Pet. App. 9a).

[44]*See* Council on Environmental Quality, Guidelines for Preparation of Environmental Impact Statements, 40 C.F.R. §1500.8.

[45]*Id.* 40 C.F.R. §1500.9(f); *see also* NEPA §102(2)(C).

days after filing with the CEQ.[46] Fourth, the CEQ Guidelines provide that in any event agency action shall not be taken until a minimum of 90 days after the draft environmental impact statement is circulated for comment.[47]

Thus, ILSA gives HUD 30 days to act, absent incomplete disclosure, but HUD cannot complete an environmental impact statement in 30 days. The decision below suggests that this operational conflict between ILSA and NEPA could be accommodated in the following way:

> "Thus, a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement."[48]

In order to begin preparing an environmental impact statement, however, HUD must at the very least know what a developer plans to do with the land, including the size, location and number of lots, utilities, sewers, roads and other improvements. When a developer knows that information he is prepared to file his statement of record. Thus, if the developer refrains from filing in order to give HUD "advance notice," the *Government caused delay* is merely shifted forward.

The decision below concludes that the effective date of a statement of record must be suspended beyond the 30 days *solely* because HUD must first complete an environmental impact statement. The statutory scheme of ILSA that authorizes a developer to begin sales 30 days after filing or correcting a statement of record and prohibits Government caused delay thereafter is thereby repealed by the court below.

[46]*Id.* 40 C.F.R. §1500.11(b).

[47]*Id.*

[48]Pet. App. 9a-10a.

There is no reason, however, to frustrate the statutory scheme of ILSA in order to provide for environmental disclosure. For example, HUD could initiate a rule-making proceeding to require environmental disclosure in statements of record and property reports—consistent with the statutory scheme of ILSA.[49] Respondents requested no such relief from HUD or from the District Court.

The decision below defeats the statutory scheme of ILSA and thus conflicts with the principle announced by the Court in SCRAP I that NEPA does not sub silentio amend or repeal by implication any other statute.

[49]*See Natural Resources Defense Council v. SEC*, 389 F. Supp. 689 (D. D.C. 1974).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below, to the extent that it affirms the judgment of the District Court, should be reversed.

Respectfully submitted,

HARRY A. RISSETTO
EDWIN KRONFELD
THOMAS C. WATSON
HERBERT F. STEVENS
1800 M Street, N.W.
Washington, D.C. 20036

F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Counsel for Petitioner
Flint Ridge Development Company

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

APPENDIX

STATUTES INVOLVED

National Environmental Policy Act of 1969, United States Code, Title 42

§4332.

The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall–

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the

comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

§4333.

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§4334.

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act,

or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§4335.

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

Interstate Land Sales Full Disclosure Act,
United States Code, Title 15

§1702

(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to–

* * *

(3) the sale or lease of any improved land on which there is a residential, commercial, or industrial building, or to the sale or lease of land under a contract obligating the seller to erect such a building thereon within a period of two years;

* * *

§1703.

(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails–

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and

(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

* * *

§1705.

The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

(7) (A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

§1706.

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the

developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

* * *

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

* * *

§1716.

The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

Nos. 75-510 & 75-545

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

FLINT RIDGE DEVELOPMENT COMPANY, AND CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Petitioners,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS

ANDREW T. DALTON, Jr.
2536 East 51st Street
Tulsa, Oklahoma 74105

JAMES N. KHOURIE
2626 East 21st Street
Tulsa, Oklahoma 74114

Counsel for Respondents

Cone-Lewis Printing Co. • 323 E. 3rd • Tulsa, Okla. 74120 • Phone (918) 582-1234

INDEX

Page

I. Statement of Facts 1

II. Issues 8

III. Summary of Argument 9

IV. Argument 11

A. The Moral Imagination and Disclosure Laws 11

B. The Neglectful Steward,
A Legislative History of NEPA 18

C. Take A Hard Look—
Federal Action on the Environment.....36

D. The Myth of Nondiscretion 51

E. An Indispensable Burden 54

F. The Fullest Extent Possible 67

Conclusion 76

Appendix A 1a

Appendix B 17a

Appendix C 29a

Appendix D.....33a

Appendix E 42a

CITATIONS

Cases:

Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P. (1975) 422 U.S. 289, 45 L.Ed.2d 191, 215.....39, 41, 68, 69, 74, 75

Calvert Cliffs Coordinating Committee v. A.E.C. (C.A.D.C., 1971) 449 F.2d 1109.....30, 37, 56, 69, 70, 71, 76

Davis v. Morton (C.A. 10, 1972) 469 F.2d 593.....39, 45, 48

Page

Ely v. Velde (C.A. 4, 1971)
451 F.2d 1130 .....30, 39, 40, 47

Environmental Defense Fund v. Tennessee Valley Authority (C.A. 6, 1972)
468 F.2d 1164 .....19, 30, 32, 36

Minnesota Public Interest Research Group v. Butz
(C.A. 8, 1974) 498 F.2d 1314 .....32, 41, 44, 45, 75

National Forest Preservation Group v. Butz
(C.A. 9, 1973) 485 F.2d 408 .....39, 44, 45, 75

National Helium Corp. v. Morton
(C.A. 10, 1971) 455 F.2d 650 .....40, 61

N.R.D.C. v. Grant
(E.D.N.C., 1972) 341 F. Supp. 356 46

N.R.D.C. v. S.E.C. (D.C.D.C., 1974)
389 F. Supp. 689 .....15, 64, 65, 68, 71, 72

Rucker v. Willis
(C.A. 4, 1973) 484 F.2d 158 .....44, 45, 69

Scherr v. Volpe (D.C. Wis., 1971)
336 F. Supp. 882 affirmed 466 F.2d 1027 61

S.C.R.A.P. v. U.S. (1973) 412 U.S. 669 .....67, 68

Scientists Institute for Public Information, Inc. v. A.E.C. (C.A.D.C. 1973) 481 F.2d 1079 .....48, 49

Service v. Dulles, (1957) 354 U.S. 363 .....3, 40

Silva v. Romney (D. Mass., 1972)
342 F. Supp. 783 .....3, 40, 61

Simmans v. Grant
(D.C.S.D. Tex., 1974) 370 F. Supp. 5 .....44, 45, 49

Steubing v. Brinegar (C.A. 2, 1975)
511 F.2d 489 66

Page

Vitarelli v. Seaton, (1959) 359 U.S. 535 .....3, 40

Wyoming Outdoor Coordinating Council v. Butz
(C.A. 10, 1973) 484 F.2d 1244 .....44, 45, 46, 69

Zabel v. Tabb (C.A. 5, 1970)
430 F.2d 199, cert. den. 401 U.S. 910 (1971).....36

Statutes and regulations:

National Environmental Policy Act of 1969,
Section 101 (b) 57

National Environmental Policy Act of 1969,
2 U.S. Code Cong. & Adm. News 1969,
p. 2770 .....54, 57

National Environmental Policy Act of 1969,
Section 102 (B) 57

National Environmental Policy Act of 1969,
Section 102 (2)(C) 73

National Environmental Policy Act of 1969,
Section 103 75

Safe Streets Act, Title 42 U.S.C. § 3733 48

Securities and Exchange Act of 1933,
15 U.S.C. § 77a et seq 72

15 U.S.C. § 1705 (12) 52, 75, 42a

15 U.S.C. § 1706 (a) 72

15 U.S.C. § 1706 (b, c, d) 52, 42a-46a

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and Appendix D 61

Page

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Page

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Page

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Nos. 75-510 & 75-545

In the Supreme Court of the United States

OCTOBER TERM, 1975

FLINT RIDGE DEVELOPMENT COMPANY, AND CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Petitioners,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS

I
STATEMENT OF FACTS

The Web of the Caddis Fly

The Illinois River Basin is a community of interdependent and interacting parts. It is, without question, a unique and fragile ecosystem of the kind Congress had

in mind when it said in NEPA:

> "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, *declares that it is the continuing policy of the Federal Government, in* cooperation with State and local governments, and other concerned public and private organizations, *to use all practicable means and measures,* including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." (emp. added)

Into the life stream of this ecosystem there has been introduced a foreign body of a luxury, leisure-home development—an intrusion the basin cannot withstand. This type of infection is quite widespread already. Witness its effects in the States of California, Colorado, Arizona, New Mexico and Florida.[1] Twenty-five thousand people

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[1] *5th Annual Report of C.E.Q.*, App. # D, p. 21-26. This material is taken from a study on leisure homes undertaken by the American Society of Planning Officials for C.E.Q. and H.U.D.

have already expressed their disapproval by requesting protection for the river.[2]

The developer and the Federal Government have displayed a complete lack of candor with the Court in their discussion of the actual and potential adverse environmental effects of these expensive and wholly unnecessary pleasure domes.

There is more to environmental degradation than 3,000 septic tanks as even a purblind examination of the record will reveal.

> "Of course, to look at it in the light of if it were just the sewerage that was before the Court is one thing, but there is more before the Court than the question of sewage disposal, septic tank operation, and the soil in which the septic tanks are going to flow.
>
> * * *
>
> "Pollution will destroy not only the river but will destroy the very thing that Flint Ridge is trying to do, and that is to sell lots and prepare nice, decent, clean places for people to live.
>
> "Well, I could go on for a long time because the

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[2] HUD has incorporated a test of *controversy* into its own procedures for determining when to prepare impact statements and this constitutes an admission that any of its decisions which create substantial controversy as to the nature of effect of its action is a major federal action significantly affecting the quality of the human environment. Handbook 1390.1 Ch. 5a(3). See *Silva v. Romney* (D. Mass., 1972) 342 F. Supp. 783 which holds that a federal agency is bound by its own regulations, and generally *Service v. Dulles*, (1957) 354 U.S. 363; *Vitarelli v. Seaton* (1959) 359 U.S. 535.

evidence in this case is very impressive to the Court." (R. p. 552-553, comments by Judge Bohanon)

The Government and the developer seem indifferent to the biotic pyramid—the delicate balance of nature.

The fragility of the Illinois River ecosystem and the destructive environmental effects on that system by a development can be demonstrated, and was, in a number of ways.

Consider for the moment just one effect of the development; and that is, sedimentation (which Petitioners ignore in their account of the facts). Sediment does extensive damage to the aquatic life in a stream of the quality of the Illinois River. (R. p. 253) The basic building block of that aquatic life is a tiny, but very important, organism called the Web-spinning Caddis Fly. It is a little creature that lives in the river and spins a web to catch its food—fiber plankton. The web does more. It knits many of the little rocks in the stream to each other and to larger rocks. By tying small rocks to larger rocks with its web, the Caddis Fly single-handedly maintains channel stability. Its greatest enemy is sediment. It cannot cannot catch its food with a muddy web.

Even something as apparently innocuous as a road crossing causes the Caddis Fly population to drop off significantly. In fact, existing sediment in the Illinois River has already caused a drop in the Caddis Fly

population and further development will increase this effect to catastrophic proportions. This will result in a loss of channel stability as well as the pool and ripple nature of the river.

Once the stability of the river is altered, one, but not all, of its effects is a destruction of fish habitat and stream quality. Loss of stability also changes the entire nature of the river because loose gravel, no longer bound together by the healthy work of the Caddis Fly, will be transported down the stream to the first dam. On this journey it will stir up even more sediment thereby dramatically increasing the destruction inflicted upon plant and animal life (R. p. 253-256).

There is no dispute that the development will cut roads, clear land and cause sedimentation notwithstanding even the most sublimely effective septic tank system. That the Petitioners are playing false with the facts in this case is obvious.

The truth is the Flint Ridge development will actually or potentially result in the complete destruction of the Illinois River Basin. *There will be substantial effects on the quality of the human environment in all of its aspects.* The river is a State designated scenic river and is included for study in the National Wild and Scenic Rivers System. The evidence presented at trial clearly established, *and it is uncontroverted on appeal to this*

very day, that as a result of th's development *there will be adverse effects upon the Illinois River and its Basin and also upon the course and depth of the river, its tributaries and drainage area, the plant life, wildlife habitats, fish and wildlife, soils, air, esthetics of the area and upon the socio-economic conditions of the area, including such matters as health, hospital care and facilities, roads and highways, schools, police and fire protection (Trial Court's Finding No. 14, R. p. 689).*

But there is a better way—even with the existence of the development. Many of the problems could be resolved and consequences mitigated. NEPA is not a paper-pushing exercise when undertaken in good faith. Witness the testimony of the various State officials who would be called upon to rectify the environmental harm. Administrators from Planning Offices, Recreational and Pollution Control Agencies all stated that the preparation of an environmental impact statement would be of use and value to them in the performance of their duties [R. p. 208 (pollution control), R. p. 281 (planning), R. p. 246 (recreation)].

The Federal Government simply refuses to comply with the National Environmental Policy Act (NEPA)—a serious dereliction of duty according to the Trial Court (Finding No. 13, R. p. 689).

It should be remembered that in all things this is

an action brought by the people against administrative officials of the Federal Government who refused to comply with Federal Law. This action was brought *prior* to the effective date of the filing under the Interstate Land Sales Act in this case; and, notwithstanding the bringing of this action, the environmental degradation proven beyond any doubt, and the clear mandate contained in the National Environmental Policy Act, together with its high principles, the Federal Government adamantly, negligently refuses to comply with this law.

Why is all of this important? Because the statute (NEPA) refers to major federal action *significantly affecting the quality of the human environment.* The facts in this instance must be taken as an actual and potential occurrence in the time and space of an entire river system; not just today, but tomorrow as well.

We asked the Government to prepare an adequate environmental information base before it acted to permit the developer to sell lots in interstate commerce. *It is foolish to assume that if the developer is not permitted to sell in interstate commerce that the environmental degradation will occur in any event. It is not only foolish but absurd.* Equally obvious is the fact that the 3.5 million dollars was not spent to degrade the environment. Some must have been spent for land acquisition, the massive advertising campaign and overhead expenses.

The duty, imposed by the Congressional mandate, as revealed in the Legislative history of NEPA, HUD's own regulations under NEPA and the Interstate Land Sales Act and unanimous judicial interpretation of NEPA has been ignored. The Trial Court correctly summed this up as a serious dereliction of duty not only under the law but to the people whom the officialdom of HUD is supposed to serve.

When viewed in the total context there is no other conclusion than that reached by the Courts below.

II
ISSUES

The Government and the developer attempt, for the first time, to interject issues totally foreign to the facts and record. Allegations of what might, may or could, occur are no part of this case.

Therefore, Respondents submit that the issues presented to the Trial Court and to the Circuit Court of Appeals, and which were addressed and ruled upon by the respective courts, are as follows:

(1) Whether *under the facts* of *this* case—facts which conclusively demonstrate significant actual and potential environmental degradation—the Department of Housing and Urban Development must comply with the National Environmental Policy Act and prepare an environmental

impact statement *on this particular interstate land sales filing.*

(2) Whether HUD is exempt from the standards and mandates of NEPA.

(3) Whether HUD is bound by its own rules, policies and procedures.

This Court should not be fooled by the blasé and speculative approach to this case of the government and of the developers.

III
SUMMARY OF ARGUMENT

Our argument will discuss disclosure laws including NEPA and the moral imagination which produced and welds them together as a part of an overall pattern.

The legislative history of NEPA instructs that NEPA is to apply to all Federal agencies and all Federal officials when they take action or permit others to take action which will affect the environment. The aim of NEPA as enacted by Congress was to force the Federal agencies, the neglectful stewards, to pay attention to the environmental consequences of their decisions, and it enlarged their mandates to do so.

At a minimum Congress demanded a "hard look" and where necessary preparation of an impact statement (albeit not in all cases as HUD sweepingly suggests).

That is why the District Courts and the Courts of Appeal of The United States have ruled that NEPA applies to all federal actions which have a reasonably substantial relationship to the quality of the human environment, whether that action consists of direct federal impact on the environment, or actions taken by other persons which will have a substantial environmental impact, and for which federal permission is required, or which sets into motion the environmental degradation.

Major federal action is a mixed question of law and fact. One test for major federal action is whether, as a result of federal action, a private party is permitted to undertake environmental degradation; and, if so, such action is major.

It does not foster the purposes of NEPA or make any sense to find federal action minor when the environmental effects of agency action, or action it permits private parties to take, are substantial.

The argument that the statutory operating authority of ILSA prohibits or makes compliance with NEPA impossible is unsupportable in fact and in law.

Superimposed upon the grant of authority to HUD to regulate interstate land sales is the Congressional mandate contained in NEPA and this gives specific content to HUD's authority under ILSA to require dis-

closure of environmental information in the public interest in the form of an environmental impact statement. ILSA and NEPA are full disclosure statutes which complement each other.

HUD cannot at this juncture raise this issue, since it is in violation of Section 103 of NEPA. HUD has failed for five years to ascertain the existence of any deficiencies or inconsistencies in ILSA and to ask Congress for revision.

In an argument totally devoid of support in the record, in the law or in real life, HUD whines about administrative burden. One might suppose that Congress has no power to give tasks to federal bureaucracies. Nevertheless, there is no crushing administrative burden as a result of this case or any other. Nevertheless, the National Environmental Policy Act has for its goals higher values than administrative ease and, in any event, this is a matter which should be addressed to Congress.

IV

ARGUMENT

A

The Moral Imagination and Disclosure Laws

NEPA is more than just an idealistic, if belated, effort to force all Federal agencies to pay attention to long-ignored environmental factors before taking any action, no matter how slight, which may significantly

affect the human environment. The Act is Congressional recognition of the "ecological necessity" for establishing an *ethical* relationship between men and the land.[3] NEPA acknowledges and approves the view that people, land, and the living things on the land, are a community of inseparable and interdependent parts. It rejects the destructive notion that our relationship to the land is solely economic, bestowing privileges on us but involving no obligations. The promontory of truth in NEPA is that land is not just property subject to disposal by expediency. As the drafters of NEPA realized, people, soil, water, plants and animals are a community which deserve both love and respect. It is an ecological body of the one and the many, and that many includes both the individual and the government. This means that questions of right and wrong must be considered by Federal agency decision-makers when their actions may affect this community.

Conservation has been defined as a state of harmony between men and land.[4] The moral imagination which produced NEPA declares that the purpose of the Act is to "encourage productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321, and "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C.

[3]Aldo Leopold, *A Sand County Almanac*, p. 203.

[4] Ibid. p. 207.

§ 4331. These words establish not only the ethical content of the Act, but knowledge that abuse of the environment is not only wrong, it is *uneconomic.* The ethical base of NEPA is not the product of some environmentalist's sentimental view of nature with no concept of economic reality. In fact, the more myopic view rests with those who advocate enhancement of personal resources according to unrestricted self-interest no matter what the cost. It is from this point of bias that the *ad hominem* epithet "land use" is thrown at any attempt to vindicate the public interest.

This cheap polemic abases the questions raised here and has nothing to do with the extension of ethic to federal actions which may affect the quality of our environment. This absurd and angry argument also ignores the fact that long ago *laissez faire* economics was supplanted, in major part, by "cooperative mechanisms with an ethical content".[5]

What then is NEPA's land ethic? It is a method of guiding us when we encounter ecological circumstances that are so new or involved or which have such delayed consequences that the correct choice to make in dealing with them is not readily ascertainable to the average man. We need information, study, and an interdisciplinary attack of the problem to arrive at a solution which is

[5]Aldo Leopold, *A Sand County Almanac*, p. 202.

ecologically, economically and technologically sound. With facts provided for both the agencies and the Congress, plus state and local governments, we can build a reservoir of community knowledge and intuitive response to protect our community for generations to come. Why then do we have such obdurate refusals on the part of the Government to take an "ecological" look before it acts?

The development of ethic is actually a definitive part of ecological evolution. Since ecology is the study of the relationship of organisms to each other and to their environment and their total interaction, it includes the relationship of individual to individual, individual to society, and the perception of the natural processes by which the land and the living things on it continue their existence by working out modes of cooperation.

The ethical sequence at work in the enactment of NEPA was preceded by earlier extensions in such laws as the Securities Act of 1933 and ILSA.

The mode of cooperation selected to counter the abuses in the securities industries in the 1930's was the enactment of federal regulations to restore investor confidence and to protect the public and prevent economic extirpation. The SEC was given broad rule-making power to require disclosure of information in the public interest, and, as we have recently discovered, NEPA gives specific

content to the SEC's power to require disclosure of specific information; in this instance, environmental facts in the public interest. *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689. There is no doubt that the basic mandate of the SEC and of HUD in the administration of ILSA was expanded by the later enactment of NEPA, and even a cursory glance at the legislative history involved here shows this to be true.

ILSA is also a full disclosure law. It was patterned after the Securities Act of 1933, and in fact the first plan was to have the registration statement of the developer filed with the SEC., 113 Cong. Rec. 315-316 (January 12, 1967). Its passage was also stimulated by the interest of many planners and journalists concerned about "land use" in their home state, 113 Cong. Rec. 316 (January 12, 1967). Senator Mondale described it as a consumer protection statute placing an affirmative responsibility on one who sells real estate in interstate commerce to affirmatively tell all of the facts, the bad as well as the good, so the purchaser can make a rational judgment, 113 Cong. Rec. 317 (January 12, 1967).

Ethic was at work in the minds of the Congress at the time of the passage of ILSA. We need only to examine 21 *Case Western Reserve Law Review* at p. 9 to see the ethical sequence at work:

"A third factor troubling the legislative conscience

was the land use planning problem raised by the ill-controlled marketing of thousands upon thousands of subdivided parcels, many of which were unfit for habitation either presently or in the near future. Where a large tract of marginal land is subdivided into hundreds of small lots by means of the unimaginative grid pattern, a chain reaction of planning problems is triggered. A tremendous demand is immediately imposed upon local government for the speedy development of proper drainage, sanitation, and roads, together with adequate public utilities and facilities such as schools, police and fire protection. But the area generally does not have a tax base sufficient to support such rapid expansion and improvement. This unfortunate state of affairs may lead to haphazard and patchwork community growth. It could also stymie development altogether."[6]

"A situation therefore can develop which precludes use of the land by the small parcel owners; prohibits reassembly for either a private or public purpose; and, indeed, makes it impractical even for agricultural pursuits." See Hearings Before Sub-committee on Fraud & Misrepresentation Affecting the Elderly, 89th Cong., 2nd Sess. (1964) 157-158.

The CEQ-HUD study commissioned by the Department of Housing and Urban Development and published

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[6]*Full Disclosure Comes Down to Earth*, Ronald J. Coffey & James Welch, *21 Case Western Reserve Law Review*, p. 9. See also 1965 Rep. 40, Hearings on S.B. 2672, 89th Cong., 2nd Sess., p. 44 (1966).

in 1974 indicates many of the same problems exist with regard to leisure or second home developments. It is disingenuous to argue that ILSA and NEPA are not compatible, when the CEQ-HUD study could have had no other purpose than to examine the basic environmental effects of leisure home developments on ecologically fragile areas. The CEQ-HUD study also details a myriad of ecological and economic problems arising from leisure home development. What takes place is "instant urbanization of rural communities" where local governments have little or no experience in coping with large developments and few, if any, land use controls or regulatory bodies to deal with them. Another, as yet unsolved problem, is the conflict between such developments and public recreation goals. The Illinois River Basin is now, and will be in the future, the primary recreation area of Northeastern Oklahoma. It is now easy to see why one of the specific products of the CEQ-HUD study was an *impact evaluation handbook* for use by various agencies and governments in handling the cultural shock of the second-home standard of living expansion. See C.E.Q. 5th Annual Report to Congress at 26, 490. Now is the time for candor, and unless tortured logic is employed, it is obvious that the evolving moral imagination which produced the SEC and ILSA also created NEPA.

As our consciousness of ourselves and our land as

a community grows, so should our law grow. All three of these Acts require full disclosure of information to vouchsafe rational choice, whether that choice is to be made by the individual, or society through its appointed, but sometimes balky servants, the Federal agencies.

The Securities Act of 1933, ILSA and NEPA are not discrete entities enacted in a vacuum. They were, and are, stages in an evolutionary process which, in its own unique way, evolved the instincts and philosophies that produced three laws that fit together like preconceived parts of a plan not yet fully revealed, but whose outline may be seen by any who are willing to listen to the voice of conscience and take a "hard look".

B

The Neglectful Steward
A Legislative History of NEPA

We have briefly outlined the philosophy which produces legislation designed to protect the public interest. We also explained how many of these acts are interrelated and are grounded in national policy. The Petitioners make the dual argument that the activity involved in this case is not "major federal action significantly affecting the quality of the human environment" and that there is an irreconcilable conflict between the mandate of the Interstate Land Sales Act and the mandate of the

National Environmental Policy Act. One need only to peruse the legislative history of the National Environmental Policy Act to explode each of these arguments.[7]

The Courts have instructed us that:

"In analyzing Appellants' contentions, *we are not restricted to the bare wording of section 102 of the NEPA. Sections of statutes should not be considered out of context and in interpreting legislation, Courts will examine the entire statute, including its objects and policies. Richards v. U.S.*, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed.2d 492 (1961).

'[C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in light of context, and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.'

"S.E.C. v. C.M. Joiner Leasing Corporation, 320 U.S. 344, 350-351, 64 S. Ct. 120, 123, 88 L. Ed 88 (1943). See also, Cornett-Lewis Coal Company v. Commissioner Internal Revenue, 141 F.2d 1000, 1004 (6 Cir., 1944)."

Environmental Defense Fund v. Tennessee Valley Authority (C.A. 6, 1972) 468 F.2d 1164, 1173.

Congress had five objectives in mind by passing NEPA. It (1) enlarged the Federal agencies' mandate and established a national environmental policy; (2) established specific "action-forcing" procedures to carry

[7] For an extensive analysis of the Legislative History see Anderson, *NEPA in the Courts*.

out the policy; (3) provided a mechanism to develop indices of environmental quality; (4) established the Council on Environmental Quality (CEQ); and (5) provided for reports to be made to Congress concerning the progress toward accomplishing the goals of NEPA.

We are here concerned with the first three of these objectives.

What is the purpose of the National Environmental Policy Act as announced by Congress? "The Act, after all, is a National Environmental *Policy* Act. Its legislative history is replete with broad language pointing out large areas of Federal environmental impact, the control of which would require major changes in government decision making." Comment, ***NEPA & Federal Policy Making: NRDC v. Morton, Legislative Impact Statements, and Better NEPA Procedures,*** 2 E.L.R. 1038, 1040.

The purpose of the Act as announced by Congress is:

> "The purpose of S. 1075, the National Environmental Policy Act of 1969, is to establish, by Congressional action, a national policy to guide Federal activities which are involved with, or related to, the management of the environment or which have an impact on the quality of the human environment." 115 Cong. Rec.—Senate July 10, 1969, 19008, 19010.

In addition to creating a national policy for the environment, the Act:

> " . . . provides a considered Congressional statement

> of national goals and purposes for the management and preservation of the quality of America's future environment. *The bill directs that all Federal agencies conduct their activities in accordance with these goals and provides action-forcing procedures to insure that these goals and principles are observed. The bill specifically provides that its provisions are supplemental to the existing mandates and authorizations of all Federal agencies. This constitutes a statutory enlargement of the responsibilities and the concerns of all instrumentalities of the Federal Government."* 115 Cong. Rec.—Senate July 10, 1969, 19008, 19009; (emp. added).

See also comments of Senator Jackson, 115 Cong. Rec. at 40416 (December 20, 1969). We may conclude that, if nothing else, the Act established a policy of the highest order. Part of the reason for this policy is given in an introduction to the report promulgated by the Senate Committee on Interior and Insular Affairs:

> "It is the unanimous view of the members of the Interior and Insular Affairs Committee that our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces.
>
> *"The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life. We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion, and conditions within our central cities*

which result in civil unrest and detract from man's social and psychological well-being; the loss of valuable open spaces; inconsistent and, often incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species; faltering and poorly designed transportation systems; poor architectural design and ugliness in public and private structures; rising levels of noise; the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; and increasingly ugly landscape cluttered with billboards, powerlines and junkyards; and many, many other environmental quality problems.

"Traditional national policies and programs were not designed to achieve these conditions. But they were not designed to avoid them either. *And, as a result, they were not avoided in the past. They are not being avoided today.*"

* * *

"As a result of this failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. *Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.*

"Today it is clear that we cannot continue on this course. Our natural resources—our air, water, and land—are not unlimited. We no longer have the margins for error that we once enjoyed. The ultimate issue posed by shortsighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are clear."

* * *

"To provide a basis for advancing the public interest, a congressional statement is required of the evolving national objectives of managing our physical surroundings, our land, air, water, open space, and other natural resources and environmental amenities." (emp. added) 115 Cong. Rec. 19009-10 (July 10, 1969).

If the goals and principles were to be effective, three things had to occur. First, *every* Federal agency had to be governed by the Act. Second, "action-forcing" procedures had to be adopted. Third, the language had to be such that *no* agency could "utilize an excessively narrow construction of its existing statutory authorization to avoid compliance."

As passed, NEPA accomplishes all three objectives. Nor have the Courts interfered with the accomplishment of these objectives; but on the contrary, have reinforced the Congressional intent by decisive judical action. Congress obviously envisioned the necessity to overcome the bureaucratic inertia.

It is clear that by the time the Senate passed the bill in July of 1969 that the legislation would *add to* existing mandates of Federal agencies. This includes agencies which had earlier argued that they had no authority to consider environmental effects or their actions. See, *Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. at 116.

As early as July of 1969, it was the intent of Congress that rather than changing each agency's operating statutes it would be better to "lay down a general requirement that would be applicable to *all agencies* that have responsibilities that affect the environmental rather than trying to go through agency by agency." See *Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. at 116-17.

As further support for this position, we see that immediately after the Senate hearings in April of 1969, Senator Jackson directed the Interior Committee staff to draft an expanded statement of national environmental management goals, to grant new authority to Federal agencies "which at the present time, have no mandate or responsibility for the management and protection of the human environment." See, *Hearings on S. 1975, S. 237 and S. 1752 Before the Senate Committee on*

Interior and Insular Affairs, 91st Cong., 1st Sess. at 206. In this way "no agency would then be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its action." See, *Hearings, on S. 1075, S. 237 and S. 1752 Before the Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. The result was that the National Environmental Policy Act *"would provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of any independent agency as well as the ongoing activities of the regular Federal agencies."* 115 Cong. Rec. 19012 (July 10, 1969).

One needs only to read the language of Senator Jackson to conclude that the National Environmental Policy Act superimposes additional duties and responsibilities upon all existing Federal agencies of whatever kind or category. "This constitutes a *statutory enlargement* of the responsibilities and concerns of *all instrumentalities* of the Federal Government." 115 Cong. Rec. —Senate (July 10, 1969) 19009. And on December 20, 1969 he said, "Taken together, the provisions of section 102 directs *any* Federal agency *which takes action* that it must take into account environmental management and environmental quality considerations." (emp. added) 115

Cong. Rec.—Senate 40416 (December 20, 1969).

From the beginning it is obvious that Congress intended to interrupt business-as-usual. NEPA was to be an Act to have immediate and substantial effect on ongoing governmental operations.

When Senator Jackson first introduced S. 1075, Professor Lynton K. Caldwell spoke of the need for "action-forcing" provisions and said:

> "Let me give you just a few illustrations of what I mean, by policy forcing or operational aspect of a policy statement. For example, it seems to me that a statement of policy by the Congress should at least consider measures to require the Federal agencies, in submitted proposals, to contain within the proposals an evaluation of the effect of these proposals upon the state of the environment, that in the licensing procedures of the various agencies such as the Atomic Energy Commission or the Federal Power Commission or the Federal Aviation Agency there should also be, to the extent that there may not now exist fully or adequately, certain requirements with respect to environmental protection, that the Bureau of the Budget should be authorized and directed to particularly scrutinize administrative action and planning with respect to the impact of legislative proposals, and particularly public works proposals on the environment."

In response to this statement, Senator Jackson concurred and said:

> "Well, Dr. Caldwell, that is an excellent presentation. . . . I have been concerned with the inadequacy of the policy declaration in the bill that I introduced. Obviously, this is not enough . . . I agree with you that realistically what is needed in restructuring the governmental side of this problem is to legislatively create those situations that will bring about an *action-forcing* procedure that departments must comply with. Otherwise, these lofty declarations are nothing more than that." Hearings on S. 1075 Senate Committee on Interior and Insular Affairs at 116.

Senator Jackson then turned to the manner in which such a "restructuring" could be accomplished.

> "I am wondering if we might not broaden the policy provision in the bill so as to lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment rather than trying to go through agency by agency.
>
> "I think the immediate example . . . is that the Atomic Energy Commission, in granting permits or licenses in connection with nuclear powerplants, *should be required to make an environmental finding.*
>
> "This, of course, might be applicable to the Federal Power Commission. One can go on down the list of agencies. I am trying to avoid a recodification of all of the statutes. . . .
>
> 5] . . . If we try to go through all of the agencies that are now exercising certain responsibilities pursuant to law in which there is no environmental policy or standard laid out, we could be engaged in a recodification of the Federal statutes for a long, long time." ID at 117.

In order to implement this policy, Congress created

certain "action-forcing" procedures. They are outlined in Section 102 of the Act and the duties imposed by Section 102 are to be complied with fully by every agency. 115 Cong. Rec. 39703 (December 17, 1969).

From the report on the hearings conducted by the Senate Committee on Interior and Insular Affairs we learn that Congress was not engaging in rhetoric when it stated the goals and principles of NEPA.

> "A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation. But, if goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain 'action-forcing' provisions and procedures which are designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment." 115 Cong. Rec. 19010-11 (July 10, 1969).

The strength of the Congressional intent behind these "action-forcing" procedures is apparent from the conference report on NEPA reproduced at 115 Cong. Rec. 39703 (December 17, 1969). Since we deal primarily with the phrase "to the fullest extent possible," insofar as compliance with the Act is concerned, it is important to know how both the House and the Senate agreed as to the meaning and intent of this phrase.

> "As noted above, the conference substitute provides that the phrase 'to the fullest extent possible' applies with respect to those actions which Congress authorizes and directs to be done under both clauses (1) and (2) of section 102 [in the Senate bill, the phrase applied only to the directive in clause (1)]. In accepting this change to section 102 (and also to the provisions of section 102), the House conferees agreed to delete section 9 of the House amendment from the conference substitute. Section 9 of the House amendment provided that 'nothing in this Act shall increase, decrease or change any responsibility or authority of any Federal officials or agency created by other provision of law.' In *receding* from this House provision in favor of the less restrictive provision 'to the fullest extent possible', the House conferees are of the view that the new language does not in any way limit the Congressional authorization and directive to all agencies of the Federal Government set out in subparagraphs (A) through (H) of clause (2) of section 102. *The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible.* If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency, compliance is required. *Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section*

102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." (emp. added)

"Thus it is apparent that this phrase, rather than qualifying the obligation of Federal agencies to comply with the requirements in section 102, constitutes an injunction to all Federal agencies to exert utmost efforts to apply NEPA to their own operations." *Ely v. Velde,* (C.A. 4, 1971) 451 F.2d 1130; *E.D.F. v. T.V.A.,* (C.A. 6, 1972) 468 F.2d 1164, 1176; *Calvert Cliffs Coordinating Committee v. A.E.C.,* (C.A.D.C., 1971) 449 F.2d 1109.

At this juncture we find that Congress has, in the strongest possible language, provided for policy, for a mechanism to implement that policy, and a directive to utilize that mechanism.

What are the environmental considerations that must be considered? Again, the Congressional history instructs us.

> "We see increasing evidence of this inadequacy all around us: . . . *the loss of valuable open spaces; inconsistent and often, incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems;* needless deforestation; *the decline and extinction of fish and wildlife species;* 115 Cong. Rec. 40417 (December 20, 1969) [8]

The language of the legislative history indicates that Congress intended that the "action-forcing" provisions of NEPA should apply to *all* Federal actions which affect the quality of the human environment.

If the Federal action has the significant effect, Congress means for the Federal agencies to evaluate that effect in light of the requirements of section 102(C) of NEPA. It is obvious that it is the "significant effect" which requires the evaluation and which establishes the base line definition of "major federal action." The legislative history is clear on this point. " . . . each agency which proposes . . . *any other major federal action* shall make a detailed statement as to whether the proposal would have a significant effect upon the quality of the human environment. *If the proposal is considered to have such a significant effect, then the recommendation or report on the proposal must include a detailed statement by the responsible official . . .* " (emp. added) 115 Cong. Rec.—Senate 40420 (December 20, 1969).

The action in this case was the *decision* to allow the

[8] Each of these, and others, were proven in the trial. HUD does *not* dispute the significant effect on the quality of the human environment.

developer to proceed in interstate commerce by the issuance of a letter of compliance with ILSA. That this decision has significant effect upon the environment is uncontroverted.

Petitioners cast doubt upon the intent of Congress with regard to which Federal actions require an environmental impact statement. It is an axiomatic rule of law that whenever there is doubt about the meaning of a particular statutory term courts *must* construe that term to give effect to the intent of Congress. *E.D.F. v. T.V.A.* (C.A. 6, 1972) 468 F.2d 1164. Construing the Act as a whole, we see the terms "major" and "significantly affecting" seem to have been used more for emphasis rather than as limitations. In all events, it makes little sense to call a Federal action minor when its effects are admittedly major. *Minnesota Public Interest Research Group v. Butz,* (C.A. 8, 1974) 498 F.2d 1314.

Similar Congressional adamance is reflected in the Congressional History of Section 103 of the National Environmental Policy Act. For HUD to state, as they do in this case, that NEPA does not apply to Interstate Land Sales filings, is to admit violation of the law.

> "This section is based upon a provision of the Senate bill [section 102(f)] not in the House amendment. This section, as agreed to by the conferees, provides that all agencies of the Federal Govern-

> ment shall review their 'present statutory authority, administrative regulations, and current policies and procedures to determine whether there are any deficiencies and inconsistencies therein which prohibit full compliance with the purpose and provisions' of the bill. *If an agency finds such deficiencies or inconsistencies, it is required under this section to propose to the President not later than July 1, 1971, such measures as may be necessary to bring its authority and policies into conformity with the intent, purposes, and procedures of the bill.* Section 103 thereby provides a mechanism which shall be utilized by all Federal agencies (1) to ascertain whether there is any provision in their statutory authority which clearly precludes full compliance with the bill and (2) if such is found, to recommend changes in their statutory authority which will enable full compliance with the bill. *In conducting the review noted above, it is the understanding of the conferees that an agency shall not construe its existing authority in an unduly narrow manner. Rather, the intent of the conferees is that all Federal agencies shall comply with the provisions of section 102 'to the fullest extent possible,' unless, of course, there is found to be a clear conflict between its existing statutory authority and the bill.*" (emp. added) 115 Cong. Rec. 39703 (Dec. 17, 1969)

The Executive Branch of this Government comes before this Court brim full of deceit.[9] Since the enactment of NEPA, the Housing and Urban Development Depart-

[9]Can anyone really explain H.U.D.'s persistent refusal to comply voluntarily with NEPA? For a revealing discussion on this point see Dorschlag and Junger, *H.U.D. and N.E.P.A.* 58 Iowa L. Rev. 805 at p. 836 and 890.

ment has enacted certain guidelines under its Handbook 1390.1 which clearly and adequately demonstrate that it considers filings under ILSA to be applicable to NEPA. (Reproduced as Appendix A to this Brief.) NEPA itself has been amended and no request was put forth by HUD to exempt its ILSA activities from NEPA. In fact, ILSA has been amended *since this lawsuit was filed* and again there has been no request for exemption or modification of the broad NEPA mandates.

Section 103 was originally a portion of subsection 102(f) of Senate Bill 1075. As it has emerged, it is clear that the section 103 "spells out what clearly was intended in the first place: the key words are 'deficiencies and inconsistences which *prohibit.*'" This has been interpreted to mean that the changes add to rather than detract from the theory of a present jurisdictional grant. Hanks & Hanks, *An Environmental Bill of Rights: The Citizens' Suit and the National Environmental Policy Act of 1969,* 24 Rutgers L. Rev. 230.

Section 103 does not provide an escape hatch for HUD. HUD is prohibited from going to 103 and complaining of conflict. To even admit or argue conflict, without having complied with 103 by going back to Congress, is to admit a violation of the law. As Judge Bohanon in the Trial Court said, "A serious dereliction of duty." Section 103 demands that HUD to go back to

Congress and obtain the necessary adjustments to their present statutory mandates—*if* they feel there are adjustments needed—to bring their present jurisdictional grants into full and complete compliance with NEPA. This HUD has not done; and, therefore, HUD must agree with the Courts' determination that HUD is governed by NEPA while conducting its activities as the agency in charge of administering the Interstate Land Sales Act, including Interstate Land Sales filings.

The legislative history leaves no doubt as to the purposes of Section 102:

> "Second. To insure that the policies and goals defined in this act are *infused into the ongoing programs and actions* of the Federal Government, the act also establishes some important 'action-forcing' procedures. Section 102 authorizes and directs all Federal agencies, to the fullest extent possible, to administer their existing laws, regulations, and policies in conformance with the policies set forth in this act. IT ALSO DIRECTS ALL AGENCIES TO ASSURE CONSIDERATION OF THE ENVIRONMENTAL IMPACT OF THEIR ACTIONS IN DECISION-MAKING. IT REQUIRES AGENCIES WHICH PROPOSE ACTIONS TO CONSULT WITH APPROPRIATE FEDERAL AND STATE AGENCIES HAVING JURISDICTION OR EXPERTISE IN ENVIRONMENTAL MATTERS AND TO INCLUDE ANY COMMENTS MADE BY THOSE AGENCIES WHICH OUTLINE THE ENVIRONMENTAL CONSIDERATIONS INVOLVED WITH

SUCH PROPOSALS." 115 Cong. Rec. 40415, 40416 (December 20, 1969). (emp. added)

While this Court may choose to adopt an unworkable definition of "major federal action" it cannot ignore the thorough reading of the Congressional intent made by virtually every lower court jurisdiction in the United States. As the Court said in *E.D.F. v. T.V.A.*, supra, "We believe it more consonant with Congressional intent to hold than an agency must file an impact statement whenever the agency intends to take steps which will result in a significant environmental impact"; or as the Court said in *Zabel v. Tabb* (C.A. 5, 1970) 430 F.2d 199, cert. den. 401 U.S. 910 (1971):

> "This act essentially states that every Federal agency shall consider ecological factors when dealing with activities which *may* have an impact on man's environment." Opinion at 211. See also Senate Report 91-296, p. 20.

The Courts are unanimous on this point.

C

Take A Hard Look Federal Action on the Environment

No evaluation of the term "major federal action significantly affecting the quality of the human environment" could be complete which does not constantly bear in mind that the action-forcing procedures of NEPA were

drafted in response to the Congressional belief that Federal agencies had given far too little attention to the environmental consequences of their actions. See *A Special Report to the Senate Committee on Interior and Insular Affairs,* 90th Cong. 2nd Sess. *A National Policy for the Environment* pp. 8 & 10-11.

This is why section 102(B) requires all Federal agencies to give full consideration to the environmental impact of their decision making. This requirement is also implicit in the substantive mandate of section 101 and in section 102(1), which requires interpretation of all laws, policies and regulations in accordance with the Act. It is obvious that a purely mechanical compliance with the particular measures required in section 102(C) and (D) will not satisfy the Act if they do not amount to a full, good faith consideration of the environment. The requirements of section 102(2) must not be read so narrowly as to erase the import of section 101 and section 102(1), and section 102(2)(A) and (B). *Calvert Cliffs Coordinating Committee v. A.E.C.*, (C.A.D.C., 1971) 449 F.2d 1109.

Furthermore, Executive Order 11514, 35 F.R. 4247 (1970), suggests that NEPA is to be applied to federal actions involving a federal lease, permit, license, certificate or other entitlement to use; and C.E.Q. Guidelines specifically provide for broad application to the full range of agency activities:

§ 1500.5 C.E.Q. GUIDELINES

Types of actions covered by the Act.

(a) "Actions" include but are not limited to:

(1) Recommendations or favorable reports relating to legislation including requests for appropriations. The requirement for following the section 102 (2)(C) procedure as elaborated in these guidelines applies to both (i) agency recommendations on their own proposals for legislation (see § 1500.12); and (ii) agency reports on legislation initiated elsewhere. In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental statement.

(2) New and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance (except where such assistance is solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et. seq. with no Federal agency control over the subsequent use of such funds; *or involving a Federal lease, permit, license certificate or other entitlement for use.*

(3) The making, modification, or establishment of regulations, rules, procedures, and policy.

See also, C.E.Q. Third Annual Report to Congress.

The Federal Courts have determined that the threshhold of federal involvement in private or state action to which NEPA applies should be pushed quite low, because all that is being asked is that the Federal Govern-

ment prepare an adequate environmental information base before it acts, no matter how slight its role. If this obligation seems burdensome to HUD or any other Federal agency, then, as one scholar has suggested, and this Court has indicated, the scope of the environmental impact statement could be shaped or narrowed to fit the limited federal impact on the environment, RATHER THAN HAVING NO STATEMENT AT ALL. See *Aberdeen Rockfish Railroad Co. v. S.C.R.A.P.* (1975) 422 U.S. 289 and Anderson, *NEPA, in Federal Environmental Law,* Dolguin & Gilbert, E.d., pp. 346-47. The cases are too numerous to list in which indirect or tenuous federal participation was not a bar to the preparation of an impact statement. See, for example, *Davis v. Morton,* (C.A. 10, 1972) 469 F.2d 593; and *Ely v. Velde,* (C.A. 4, 1971) 451 F.2d 1130; and *National Forest Preservation Group v. Butz,* (C.A. 9, 1973) 485 F.2d 408.

How broad is the reading the Courts have given and should give to the applicability of NEPA? Where there has been a question about the applicability of the Act to a particular action, the Courts have looked to a challenged project's long-range effects, or to its impacts when cumulated with those of allied activities, to find that potential direct and *indirect* environmental impacts in the larger context are significant. See C.E.Q. Guidelines, (1973) 40 C.F.R. § 1500.6(a). The more consequences

and alternatives the Court considers, the more significant the narrow "triggering" action which is under challenge becomes. *Ely v. Velde,* (C.A. 4, 1971) 451 F.2d 1130, 1137 n. 22.

And, where agency guidelines themselves call for the preparation of an environmental impact statement or clearance in one form or another, then, in effect, the agency concedes major federal action exists, and it cannot complain that its actions are too remote in consequence or trivial to require an environmental clearance. See *Silva v. Romney,* (D. Mass., 1972) 342 F. Supp. 783 and *National Helium Corporation v. Morton* (C.A. 10, 1971) 455 F.2d 650, and generally *Service v. Dulles,* (1957) 354 U.S. 363; *Vitarelli v. Seaton,* (1959) 359 U.S. 535.

This Court can yield to the urgings of economic expediency or governmental hostility and sloth and enunciate a rigid or absolutist definition of major federal action. To do so will violate Congressional intent and emasculate the purpose and policy of NEPA. The intent of Congress was (1) to enlarge the Federal agencies' basic mandate through enactment of a national environmental policy; (2) establish "action-forcing" procedures to attain that policy; and (3) foster the development of indices of environmental quality. This Court can also ignore the fact that no decided case applying a two-test standard has refused to require an environmental impact statement

when the environmental effects of a so-called minor project were significant, Anderson, ***NEPA in the Courts,*** p. 95. The lower federal courts have avoided what appears to be an unnecessary distinction by deciding that Congress intended NEPA to cover *all* pending federal actions that might cause significant environmental effects. "Congress' use of both 'major' and 'significantly affecting' appears to have been for emphasis, nothing more," Anderson, ***NEPA in the Courts,*** p. 89. See ***Minnesota Public Interest Research Group v. Butz*** (C.A. 8, 1974) 498 F.2d 1314.

As this Court wisely recognized in ***SCRAP II,*** the definition of major federal action, like that of Due Process of Law, must remain inherently flexible. There can be no absolute quantum of federal involvement to be used as a judicial measurement in the applicability of NEPA to agency decision-making. This would place the Act in a procrustean bed and allow it to be chopped to fit the bias of inimical agencies and private parties, rather than giving it the effect intended by Congress—application to *all* Federal agencies whenever they intend to take steps or permit others to take steps which will have significant impact on the environment.

We have, so far, avoided the catastrophe of deciding what "Due Process of Law" is by following the wiser course of determining what conduct on the part of State

or Federal officers does not accord that protection to the people. Attainment of the environmental policy under NEPA is an equally invaluable right, and it should not be destroyed by a formalistic definition of major federal action or significant effect on the quality of the human environment to satisfy short-term economic aims or unwillingness to accept administrative burdens. If the Court's aim is to decrease the amount of public interest litigation, it can do so by instructing the Federal agencies to obey Congress' mandate. In this regard, clarification would be a salutary thing, but to discourage vindication of the public interest by a constricted definition of the beleaguered terms, "major" and "significant," would do justice neither to the economic nor the environmental interests in this case, particularly, since the two interests, in the long run, are identical. Setting definitions in stone would repeal, and not *sub silentio,* a Congressional enactment by precipitate judicial decision. It will allow the Federal agencies to defederalize all projects to avoid compliance with NEPA and escape responsibility by claiming over and over: "But we haven't done anything."

No case supports the illogicality which would flow from construing "major federal action" without regard to the purposes of Congress in enacting NEPA which included forestalling repetition of the kinds of environ-

mental errors and disasters which had been brought to its attention.[10]

Petitioners understate the statutory authority of H.U.D. under the Interstate Land Sales Act. Among other things, H.U.D. can initiate criminal prosecutions and the Act also provides civil liabilities which may be enforced by H.U.D. and by the general public.

More importantly, however, it must be borne in mind throughout this whole discussion that H.U.D.'s action is a regulatory action which, if not taken, will mean that a particular filing or development will *never* be able to be sold in Interstate Commerce. In a project of the magnitude of the one under consideration, this would mean that the project would never be undertaken at the outset, or if undertaken, it would be terminated at an early stage. It is ridiculous to assume that environmental degradation will be carried out by a developer, or anyone, unless the developer may ultimately believe that he will be able to profit by his activities.

An issue before this Court is, of course, whether, under the facts of this case, there is major federal action which significantly affects the quality of the human environment. We submit that this test has been met through clear and convincing proof, which proof has been accepted

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[10] Anderson, *NEPA in the Courts*, p. 95.

in findings of fact made by the Trial Court and are now binding on this Court. *Wyoming Outdoor Coordinating Council v. Butz*, (C.A. 10, 1973) 484 F.2d 1244. Whether that phrase constitutes one or two tests is actually immaterial because: (1) The significant effect has been admitted by all parties to these appeals; and, (2) Evidence and findings of fact were submitted and accepted by the Court to establish both tests.

There is, therefore, major federal action in this case for the following reasons:

1. It makes no sense to find federal action minor when the effect of the action is substantial. Given the admission that the effect of the action is substantial there is, therefore, major federal action. *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314; *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408; *Simmans v. Grant* (D.C.S.D. Tex., 1974) 370 F. Supp. 5; *Wyoming Outdoor Coordinating Council v. Butz,* supra.

2. The question of federal action is a mixed question of law and fact and, to the extent that facts have been found by the Trial Court to substantiate major federal action, those facts are binding on this Court. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158; *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244.

3. As the concept of federal action has evolved, one test for federal action is whether, as a result of the federal action, a private party is then permitted to undertake environmental degradation, then such action is major. *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314; *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408; *Simmans v. Grant* (D.C.S.D. Tex., 1974) 370 F. Supp. 5.

4. When an agency exercises jurisdiction based upon the plenary power of Congress to act under Constitutional authority, such action is per se major federal action. *Davis v. Morton* (C.A. 10, 1972) 469 F.2d 593.

The Trial Court made numerous findings of facts supporting the conclusion that there was major federal action, and that there was a substantial effect upon the quality of the human environment. These findings are, of course, binding upon this Court. *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244. The question of whether an action is major federal action is one involving factual determinations. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158.

As found by the Trial Court, the development may destroy forever the environmental quality of the Illinois River Basin and it will have actual effect upon the depth and course of the river, its tributaries, drainage areas, etc. The Trial Court made findings both as to *actual* and

potential effects upon the quality of the human environment. The Trial Court also made findings with respect to the scope of the project and other activities associated with the quality of the human environment and the scope of the effect of the action taken by H.U.D. in this case.

The principal thrust of FLINT RIDGE's argument seems to be that there is no federal action because H.U.D. does not finance, plan, etc., development. They also suggest that H.U.D., being a regulatory agency in the contects of I.L.S.A., simply does nothing more than regulate, and therefore the concept of regulation of itself does not constitute major federal action. It is quite clear from the following cases that the determination of whether there is "major federal action" has evolved substantially from the rather simplistic approach taken by the Court in ***N.R.D.C.*** *v.* ***Grant*** (E.D.N.C., 1972) 341 F. Supp. 356. Even so, Judge Bohanon made findings which were totally consistent with the ***N.R.D.C.*** case.

At the outset, it must be recognized that all Courts accept the view that the federal agencies, under the "to the fullest extent possible" mandate of N.E.P.A., must strictly comply with the mandates of the Act. The leading case is the *Calvert Cliffs* decision. The Court in ***Wyoming Outdoor Coordinating Council*** *v.* ***Butz,*** supra, referred to the Act's mandatory requirements and high standards. As a result of these and other decisions, N.E.P.A. is

now recognized as an Act which imposes a duty on *every* federal agency to consider the effects of *each decision* upon the environment and to use *all* practicable means to avoid environmental degradation. In his book, ***N.E.P.A. in the Courts,*** Mr. Anderson states:

> "If low-level federal activities were exempted, one of Congress' main purposes in enacting the statute would fail to be achieved. Yet NEPA's legislative history shows that Congress intended to interrupt business-as-usual and affect decision making at the lowest agency levels." (P. 74, emp. added).

The Act provides ways and means to identify the effects and imposes procedural duties, duties which are *not* inherently flexible to insure compliance with the Act.

Government agencies have sought to avoid the effect of N.E.P.A. on the grounds that their acts are nondiscretionary. This argument was thoroughly rejected in the case of ***Ely*** *v.* ***Velde*** (C.A. 4, 1971) 451 F.2d 1130. In that case the Plaintiffs charged that the L.E.A.A., the federal agency responsible for administering the Safe Streets Act grants, had failed to take into account the effect of a prison center on the environment and had failed to comply with N.E.P.A. The defendants contended that, because of the peculiar nature of the block grants administered by L.E.A.A., the statutory requirements of N.E.P.A. did not apply. The Circuit held N.E.P.A. to apply.

The problem involved was that under the Safe Streets Act, Title 42 U.S.C. § 3733, the L.E.A.A. was *required in nondiscretionary terms to make grants.* The Fourth Circuit rejected this argument and stated, "The L.E.A.A. misconstrues the language 'to the fullest extent possible' found in N.E.P.A. The quoted language does *not* render the procedural requirements of N.E.P.A. discretionary. Rather the words are an injunction to all federal agencies to exert utmost efforts to apply N.E.P.A. to their own operations. In short, the phrase 'to the fullest extent possible' reinforces rather than dilutes the strength of the prescribed obligations." The Court also rejected the assumption that the Safe Streets Act is irreconcilable with N.E.P.A. This Court employed the same reasoning in rejecting a similar assumption in *Davis v. Morton.*

Federal agencies have also sought to avoid compliance with N.E.P.A. on the theory that it is not the federal agency which is affecting the environment, but it is a private enterprise which will ultimately engage in the harmful environmental activities. This is, of course, exactly what FLINT RIDGE is doing and, therefore, H.U.D. has no authority or reason for not doing an environmental impact statement.

This rationale has also been rejected time and again by the Courts.

In *Scientists' Institute for Public Information v.*

A.E.C. (C.A.D.C., 1973) 481 F.2d 1079. The A.E.C. had begun a technology research program and at issue was whether N.E.P.A. applied to such program. On p. 1088 of the Opinion, the Court stated and held that there was major federal action within the meaning of the statute not only when the agency proposes to build a facility itself, but whenever an agency makes a decision *which permits action by other parties which will affect the quality of the human environment.* In that case the development of technology would have allowed utilities to build nuclear power facilities.

The case of *Simmans v. Grant* (D.C. Tex., 1974) 370 F. Supp. 5 clearly supports the position taken by the Appellees in this case. In *Simmans* the Court discussed the issue of the test of major federal action. In so doing the Court noted that the issues as to whether a project is major or involves significant impact are not necessarily unrelated. In other words, the mere size of a federal involvement does not necessarily exempt the federal involvement from N.E.P.A. if its environmental effects are significant. The Court then held that:

> "To a great extent the determination of whether a project is major, relies upon the inquiry in whether the federal action, *whatever it may be, is the precipitating cause of the resultant environmental impact regardless of who or what may actually have caused the impact. If but for* the federal action, the impact

would not have resulted, then the federal action might be found to be major." (Emp. added).

John Steinbeck once described a Pacific tide pool as a metaphor of all life. The statement implies the knowledge of the complexity and delicacy of the interrelationships of all living organisms. Science does not claim it has sufficient ecological data to determine what makes a community cooperate and survive whether it is a tide pool or a larger multi-specific ecosystem like the Illinois River Basin. Science acknowledges the need for information from careful study to govern our actions toward our environment. Contrast this attitude with the supreme arrogance of the Government and the developer whose actions imply that we already know enough or that there is no need to know. The amount of Federal action is not controlling. The key is what that action sets in motion. As a matter of fact and of law, we know it is the kind of action and where it takes place that is determinative. We still need the kind of information compliance with NEPA will, or could, bring. This knowledge helps us understand how man-made changes affect an ecosystem and how that effect differs from a natural change. Our final decision may still be unwise, but at least we have a chance to apply what we learn. It may be that 3,000 septic tanks, storm water run-off, silt, change in fish and wildlife habitat, and severe economic burdens on poor rural counties will not adversely affect

the river basin because of development, but we cannot ignore the fact that the Courts have found there are actual and potential adverse effects from them *triggered by sales in interstate commerce.* Thoughtless arguments over the semantic distinction between "major" and "minor" actions and reliance on an excessively narrow construction of the statutory operating authority of ILSA to avoid compliance with the law can help no one. The Federal bureacracy will not perish from the Earth because it has to think about the environmental consequences of permission to sell lots in interstate commerce.

Major federal action is a mixed question of fact and law, and the courts below have made binding determinations on this issue, and that cannot be avoided by pretending it did not happen. These facts cannot be tried again at this level.

D

The Myth of Nondiscretion

The government and the developer, in tandem, repeat that HUD has no discretion in connection with the approval of interstate land sales filings, but is limited to a formalistic check of the statement of record to see that it meets technical requirements. This is the old tunnel vision ploy. It is nothing more than a spurious talisman designed to wish away the mandatory requirements of NEPA. It is argument by adjective, not fact. Can the

developer and its governmental handmaiden deny that the Secretary of HUD can require additional documentation and certification in the statement of record under 15 USC § 1705(12) for the protection of purchasers? Is this discretion? And if the Secretary, to protect purchasers and the public interest, suspends the statement of record and requires an amendment, is there still no discretion? See § 1706(b). What if, subsequent to the effective date of the statement, a change occurs affecting any material fact contained in the statement (such as controversy about the proposed development), and an amendment is ordered for the protection of the public interest, is there still no discretion? See § 1706(c).

Under 15 USC § 1706(d) the Secretary can determine that a material fact has been omitted which is necessary to make the statement not misleading under the circumstances order suspension and determine whether an amendment is necessary. If she so decides, she has absolute discretion to determine whether the amendment complies with *her* order.

She can also require certain information in the property report (the document circulated to prospective purchasers), because she feels it necessary to protect the purchaser and the public interest, and she may make rules and regulations to so order. Is there still no discretion?

Why the nondiscretionary Secretary even has a code of Federal Regulations to guide her actions in correcting statements of record, determining their adequacy, and requiring amendments and necessary changes. 24 C.F.R. § 1700.80.

24 C.F.R. § 1710.45(b) even gives her the "discretion" to suspend after the effective date of the statement of record, if it omits a material fact *she thinks* is necessary to make the statement not misleading, AND NOT JUST FOR THE OMISSION OF A FACT REQUIRED BY THE BASIC REGULATIONS. No discretion, indeed? And 24 C.F.R. § 1710.105 gives her the discretion to require additional information in the statement of record which she feels is necessary to protect the purchaser and the public interest.

Discretion lies heavy on the administrator of ILSA. It is an Act perfectly compatible with NEPA, and the exercise of discretion under ILSA in making decisions is a federal action. In this instance it is an action which *causes or induces*[11] actual and potential adverse effects on the human environment. The operating authority of ILSA and its implementing regulations bar the gate of

[11] HUD's own guidelines, Handbook 1390.1, 39 F.R. 38922 defines an environmental impact as 'any alteration of environmental conditions or creation of new environmental conditions, adverse or beneficial, caused or induced by the action or set of actions under consideration." Handbook 1390.1, Ch. 1,2(d).

nondiscretion to the HUD-developer group. Their argument is another superficial attempt to escape responsibility by a statutory construction of the narrow stripe rejected by Congress in the mandate set forth in the National Environmental Policy Act. 2 U.S. Code Cong. & Adm. News 1969, p. 2770.

Truth requires acceptance of the fact that there is no lack of procedure whereby the requirements of NEPA can be efficiently integrated with the requirements of ILSA. Robert M. Chasnow, *Compliance With NEPA in Interstate Land Sales,* Urban Land Journal, p. 12-13, May, 1975.

E

An Indispensable Burden

There is no crushing administrative burden as a result of this case or any other. Nevertheless, the National Environmental Policy Act has for its goals higher values than administrative ease.[12]

[12]HUD's claim that preparation of an impact statement in this *particular* case will result in a "crushing" administrative burden amounts only to a bad cliche and intolerable duplicity. While it pretends to comply with NEPA, its real attitude toward environmental policy has been a combination of hostility and indifference. Even as staid an institution as the General Accounting Office has been severely critical. In a *Report to Congress on the Department of Housing and Urban Development, "Environmental Assessment Efforts for Proposed Projects Have Been Ineffective"*, Comptroller General of the United States, No. B-170186 (July 22, 1975) the G.A.O. concludes:

HUD argues that because of the volume of filings HUD "could" (a significant "could") be required to prepare environmental impact statements upon a number of developments. This issue was not raised in the Trial Court and was not urged on appeal. In any event the concern of HUD with respect to the administrative problems has been rejected time and time again by all

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Note 12—*Continued*

> "In the 5 years since NEPA's enactment, HUD has not developed and implemented an adequate program for assessing the environmental impacts of projects proposed for its approval." (Rep. p. 37)
>
> The report also outlines the reasons for this conclusion. HUD's lack of priority and emphasis on environmental matters can be attributed primarily to empire building. HUD fears it will lose the opportunity to sponsor projects if the approval of applicant's plans is delayed because of time required to prepare environmental clearances, and if delayed, the developers would submit their proposals to other federal agencies or commercial lending institutions. HUD feels the environmental clearance function was added to their normal duties without a clear indication of its priority. Their own guidelines belie this claim.
>
> HUD's hostility to environmental policy is reflected in their response to the GAO's criticism of a very shoddy performance in implementing NEPA. HUD's excuse for *violating* the law is that they consider an EIS in association with a project proposal that ultimately will be rejected to be a waste of manpower and they prefer to disapprove the environmentally unsound projects before they reach an EIS stage or to have modified them along environmentally acceptable lines to carry out the spirit of NEPA without an EIS review. (Rep. p. 52) HOW CAN THIS OCCUR IN THE ABSENCE OF THE INTERDISCIPLINARY APPROACH AND ENVIRONMENTAL FINDINGS REQUIRED BY NEPA? As a

Federal Courts. *Calvert Cliffs Coordinating Committee v. A.E.C.* (C.A.D.C., 1971) 449 F.2d 1109 and its progeny have laid this argument to rest. These cases demand compliance with NEPA except where prohibited by specific statutes or impossibility. Neither situation obtains here. In all events, it must be recognized that in some cases the filing may have predated NEPA; in some cases the project may have been abandoned; and perhaps in some cases (after initial environmental review) it would be determined that there is no substantial effect on the quality of the human environment.

Note 12—*Continued*

form of environmental sop, HUD states that their field personnel still have to perform "timely, searching 'normal and special' environmental clearances on *all* projects." (Rep. p. 52) Yet they do little or none of these. (Rep. pp. 9 & 10)

HUD's claim of administrative burden is contradicted by the facts contained in the GAO report.

> "HUD offices nationwide processed from enactment of NEPA on January 1, 1970, through June 30, 1974, an estimated 30,000 project proposals which required environmental clearances. HUD offices determined that, of this number, only 81 were major federal actions which warranted environmental impact statements. (Rep. p. 11)

HUD's response to this indictment negates any right to argue that an administrative burden has been created by the lower courts' decisions. On page 58 of the report, HUD informs Congress that many project proposals relate to small projects and projects which clearly do not merit being labeled "major" or "significant" in the context of NEPA. THIS IS EXACTLY WHAT RESPONDENTS HAVE ARGUED THROUGHOUT THIS CASE. NOW HUD ADMITS THE BURDEN IS REALLY A HOLE IN THE AIR.

Secondly, NEPA requires innovative procedures. The legislative history of NEPA instructs us that "no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid compliance." The history further indicates that the phrase "to the fullest extent possible" is not to be used by *any* Federal agency as a means of avoiding compliance with the directives set out in NEPA. 2 *U.S. Code Cong. & Adm. News* 1969, p. 2770.

The argument of administrative burden further runs counter to the specific provisions of NEPA itself. For example, section 102(B) of NEPA requires Federal agencies to readjust their procedures, policies and thinking so as to comply with NEPA. As stated by the Council on Environmental Quality, the Act is a mandate to be innovative. See, C.E.Q. Third Annual Report to Congress.

Section 101(b) of NEPA orders the Government to use all practicable means to "improve and coordinate Federal plans, functions, programs and resources" to comply with NEPA's principles and policies.

Petitioners suggest that much occurred prior to the filing under the Interstate Land Sales Act. *This simply is not true.* It should be noted that only a minor portion of the activities were underway prior to the filing. In fact the Petitioner owned 7,000 acres and only a portion thereof was being developed under a phase development pro-

cedure. Secondly, the developer had another 14,000 acres under option which apparently has been dropped. Finally, much of the roads, the water supply and all of the construction activities and other forms of problems that would occur in the future were yet to be realized and would not be realized until such time as the sales had occurred and other people had become involved. (See Transcript, R. 489, 503, 504, 518.)

The issue in this case is *not how you do an impact statement* but rather is HUD required to comply with the law. Neither of the Courts below has told HUD how to perform its duty but each has unequivocally told it to perform.

Nor is the *adequacy* of performance at issue. Adequacy could not be an issue until HUD performs its duty—and if it performs in good faith, the Courts are most unlikely to interfere or substitute their judgment.

Finally, what HUD does with the evaluation is not a determinative factor as to whether compliance is required. As a minimum, however, we may suggest that the information will advise HUD officials whether adequate disclosure has been made; and, whether changes are needed in ILSA procedures. On the local and state levels, the information will be of use and value to those charged with repairing the environmental harms resulting

from the development. See Transcript R. p. 208 (pollution control), R. p. 281 (statewide planning), and R. p. 246 (recreation; and the Amicus Brief of New Mexico.

Petitioners' arguments further evidence a total disregard for the positive accomplishments of NEPA over the last six years. These have been summarized by Frederick R. Anderson in *"Six Years Under NEPA"*. Environmental Law Institute, 1976, p. 124-139.

First, NEPA has improved decision making. The Corps of Engineers claims that it has abandoned, or substantially modified, one of every three projects. HUD claims that many construction loans have been denied because NEPA analysis revealed that the *private developer's plans* were environmentally unsound.

NEPA has heightened public awareness of environmental issues and has lead to the quantifications of hitherto unquantified environmental values.

NEPA represents administrative reform. It has broadened the type and perspective of agency personnel; prompted interagency cooperation; and, improved the procedures by which an agency makes decisions.

Much of the so-called administrative burden has been removed. The trial of this case represents a broad and detailed environmental analysis. Then there is the C.E.Q.-H.U.D. study (Appendix D) which had for one

of its specific products an impact evaluation handbook. C.E.Q. Fifth Annual Report to Congress, p. 21, 26; 489, 490.

The argument is not dissimilar to that proposed in situations in which environmental protection agencies are involved. Mr. Anderson, in his book *NEPA in the Courts,* on p. 119, discusses answers to the "helpless" theories of the Government. He notes that even if the administrator must act quickly, or even if he has no discretion, impact statements can still serve the useful purpose of informing the public, the Executive Branch and the Congress of environmental impacts so that future remedies may be fashioned and discussed. Without NEPA the agency might well be reluctant to spell out the unavoidable risks and negative consequences of a proposed action. Finally the discussion of alternatives, which the administrator may in fact be helpless to implement, allows him to stimulate informed debate on future legislative needs. Although HUD has been required to formulate rules, it has not done so and is currently operating under what it terms HUD Handbook 1390.1 as the method for implementation of NEPA. It does have proposed rules which may be found at 39 F.R. 6816. Pertinent portions of the Handbook are reproduced herein. (Appendix "A")

The Courts require federal agencies to follow their

own guidelines and manuals in the implementation of their mandate under NEPA. *National Helium Corporation v. Morton* (C.A. 10, 1971) 455 F.2d 650; *Silva v. Romney* (D. Mass. 1972) 342 F. Supp. 783; *Scherr v. Volpe* (D.C. Wis., 1971) 336 F. Supp. 882 affirmed 466 F.2d 1027. It is quite significant to note that in Chapter 2, § 5(a)(1) of the Handbook certain exemptions from the general HUD policy for environmental clearances are set forth. The Interstate Land Sales Office is *NOT* exempted. A section provides "EXCEPT FOR THESE EXEMPTIONS ALL HUD ACTIONS MUST UNDERGO ONE OR MORE ENVIRONMENTAL CLEARANCES." To the same effect see Proposed Rules § 50(a)(3). Both the rules as proposed and the Handbook speak of an environmental impact in terms of "any alteration of environmental conditions, adverse or beneficial, *caused* or *induced* by the action, or set of actions, under consideration". 24 C.F.R. Part 50, § 50.3, 39 F.R. 6816 and Appendix D thereof; HUD Handbook 1390.1, Chapter 1, Section 2(d). The Handbook and the rules both suggest that major controversy concerning the existing or potential environmental effects is a factor used by HUD to extend its evaluation of environmental consequences. In the case before this Court we have more than a controversy—we have unappealed from judicial determinations of actual and potential affects upon the environment—all adverse.

To the argument that they will have to do environmental impact statements on each and every development, we can only point out that HUD provides threshholds below the magnitude of the Flint Ridge project. Some projects may require full environmental clearances and others lesser reviews. In all events, the nature and extent of the other numerous filings is not at issue before this Court nor was it in issue before the lower courts hearing this case.

Again, both the Handbook and the proposed rules provide for the conditioning of authorization upon compliance with environmental safeguards. Handbook 1390.1, Chapter 1, § 3(b); Proposed Rules 50.11(h)(2), 39 F.R. 6819. HUD may reject the matter if the environmental impacts are unacceptable, even after modification. Handbook 1390.1, Chapter 2, § 5(b)(1); Proposed Rules § 50.14(5)(d), 39 F.R. 6822.

The Handbook, in Chapter 1, §§ 3(a) and 3(b), instructs HUD officials to work with the applicant to suggest changes, to receive proposals, etc., all designed to prevent or minimize adverse environmental consequences. The same instructions are contained in Chapter 2 § 5(a)(7) of the Handbook and in the Proposed Rules § 50.11(h), 39 F.R. 6819.

It should be pointed out that the Handbook sets up a mechanism in Chapter 2, Section 5(a)(7) whereby the

applicant submits the basic yet detailed environmental information. The format for this submission is contained in the Appendix C-1 to the Handbook. In the Proposed Rules it is called ECO Form 1 (See p. 412 of the Transcript where Mr. Weaver, an official of HUD, testified that he did not know whether HUD could compel a developer to submit an environmental impact statement).

Nor may administrative inconvenience rest upon the premise of a 30-day "effective" date. Over 90 percent of the statements are not effective within the 30-day period because of suspension notices. Robert Chasnow, "COMPLIANCE WITH NEPA IN INTERSTATE LAND SALES" *Urban Land Journal* May, 1975, pp. 12 & 13. Simply incorporating existing regulations which provide environmental evaluation procedures, would involve a situation, therefore, in which the statement of record would be incomplete without the full explanation of the environmental consequences and a suspension notice would stop the 30-day period.

The developer could prefile with the Interstate Land Sales Office a notice of intent to file the statement of record. This notice of intent, a procedure used by many other agencies, would initiate the environmental review process and provide ample time to review the environmental consequences. On p. 14, footnote 11 of Flint Ridge's Petition, the suggestion was made by Petitioner

that HUD could not comply in this manner. The premise seems to be that the agency could not begin to examine the environmental consequences until the sales began. This is utter nonsense and would be the same as saying that the Corps of Engineers could not examine the environmental merits or demerits of a proposed dam until the dam was built. Furthermore, HUD's own regulation, under the Interstate Land Sales Act, § 1710.105, provides for broad and extensive disclosures and information as may be necessary for protection of purchasers or the public interest.[13]

Of course, there is another reason for preparing the environmental review, which is in no small way important, and this is that the environmental degradation imposed by the development then becomes a matter of public information and disclosure. See *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689 and discussion therein of "ethical investors."

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[13] "24 C.F.R. Sec. 1710.45(b)(i). As to the 'not misleading' requirement, see Instruction A(2) of the Instructions for Completion of the Statement of Record. *24 C.F.R. Sec. 1710.105*, which requires that

> 'in addition to the information expressly required to be stated in the statement of record, there shall be added such further material information, documentation and certification, *if any, as may be necessary in the public interest and for the protection of purchasers or necessary in order to make the statements in the light of the circumstances under which they are made, not misleading.*'" (Emphasis added) See also proposed Rule 50.11(i), Appendix B, p. 22a, *infra*.

The Petitioner makes the querulous complaint that the decision has implications for other Federal agencies. For example, they refer to the problems that may be encountered by the Securities and Exchange Commission. The Securities and Exchange Commission had its problems and lost the case of *N.R.D.C. v. S.E.C.* (D.C.D.C. 1974) 389 F. Supp. 689.

There is no evidence to support any consideration that there will be wide impact from the decision or that the industry involved will be unable, together with HUD, to comply with the National Environmental Policy Act.

Notwithstanding the fact that such argument is raised now for the first time before this Court, and further that there is no evidence to support the statement, it is distinctly possible that under the existing HUD guidelines there will, in fact, be no wide impact. To begin, many projects on file with HUD may have been filed prior to the enactment of NEPA or because of their age may be completely developed and sold.

Secondly, other projects may have been abandoned, may be under some form of suspension for economic or other reasons entirely independent of NEPA. In the former instance, it would probably not be necessary to proceed with environmental clearances until such time as it appears that the project will be reinstated. In that latter instance again the agency and the developer is on notice of the existence of the National Environmental

Policy Act and could well use the suspension time to bring itself into compliance.

With respect to the remainder of the cases, HUD in its guidelines has a three-tier approach to environmental review. In some instances it may be possible to undertake the environmental review, in good faith, and as a result thereof determine that there would be no significant effect upon the quality of the human environment. Granted, in some instances it may be necessary to carry the environmental review process to its ultimate conclusion, and that is a full-fledged environmental impact statement. However in those instances where that is necessary, it is in the public interest and in furtherance of the National policy that it be done.[14] Such environmental review would be compatible both with the Interstate Land Sales Act so as to protect purchasers and the public and the National Environmental Policy Act. However, neither Petitioner nor Respondent can advise this

[14] Compliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that these costs must be discounted. *Steubing v. Brinegar* (C.A. 2, 1975) 511 F.2d 489 at 497. See also *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422-23 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972); *Calvert Cliffs' Coordinating Comm. v. AEC*, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1122 (1971). Another direct result of NEPA-caused delays that Congress undoubtedly was aware of, is that the jobs created by a construction project might be interrupted and that the initial employment of some persons might be postponed.

Court as to how many projects would require full environmental impact statements.

Petitioner closes with a plea to this Court to reverse the case because of so-called (yet unproven) effects upon the economy. Petitioner apparently feels that the land and our natural resources are not capital and thus free for the taking. Nothing could be further from the truth. Our economy can not risk the burden of failure to comply with environmental considerations.

F

The Fullest Extent Possible

Since compliance with N.E.P.A. by HUD, as the administering agency under ILSA, is not prohibited by statute nor impossible, then the decisions of the courts below are correct in all respects.

Petitioners argue that by requiring an environmental impact statement of HUD for a project on the Illinois River, the decisions of the lower courts frustrate the scheme of ILSA and conflict with existing case law. As the Tenth Circuit stated in its opinion, "we regard this as superficial." Petitioners rely on a nonexistent holding in *S.C.R.A.P. v. U.S.* (1973) 412 U.S. 669 to support their claim that by ordering HUD to comply with NEPA the Courts have in effect repealed or amended ILSA. This is nonsense.

The issue in *S.C.R.A.P.* I was not whether there was general judicial power in a Federal District Court to determine if a Federal agency has complied with NEPA and to grant equitable relief if it has not, but rather whether, "in a specific context NEPA sub silentio *revived judicial powers* that have been explicitly eliminated by Congress" 412 U.S. 669, 696 (emphasis added).

S.C.R.A.P. I dealt with a unique situation concerning a specific statute which restricted the power of the Federal Courts to grant injunctions, and not the general applicability of NEPA to actions by Federal agencies which have impact on the environment or permit private parties to take action which will have an impact. In the context of the case Petitioners ask this Court to review, *S.C.R.A.P.* I is totally irrelevant.

The second *S.C.R.A.P.* case is *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.* (1975) 422 U.S. 289, 45 L.Ed.2d 191. Implicit in this Court's review of the sufficiency of the ICC's compliance with NEPA is this Court's recognition of the applicability of NEPA to even the ICC.

This Court also stated that the unique procedure of a general revenue proceeding under ICC was major federal action thereby requiring compliance with NEPA so long as the proceeding had a substantial effect upon the environment. This instructs us that the matter of Federal action and effect upon the environment are intertwined

and that there are not really two tests but a mixed test. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158 and *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244.

Under the facts of this case, again facts which are unappealed from, there is clear actual and potential substantial effect on the environment. As this Court stated, "NEPA does create a discreet (*sic*) procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal action and a right of action in an adversely affected party to force that obligation." 45 L.Ed.2d at 215.

The argument with respect to operational conflict, between ILSA and NEPA, becomes even more absurd after even a brief review of the legislative history of NEPA. After extensive debate about the meaning of NEPA's language in Section 102, "to the fullest extent possible," a statement was issued by the Bill's managers in the House which declared that the Act was to be complied with fully unless existing statutory law expressly prohibited full compliance or made it impossible. 115 Cong. Rec. 39703 (Dec. 17, 1969).

The case of *Calvert Cliffs Coordinating Committee v. A.E.C.* (C.A.D.C., 1971) 449 F.2d 1109 has made clear that Congress intended to excuse an agency from com-

pliance *only* where conflicting authority expressly prohibited compliance with NEPA or made it impossible. 449 F.2d 1115, Note 12.

In the Joint Senate Oversight Hearings the correct interpretation of NEPA emerged, i.e. under NEPA the decision-maker must take a hard look at the environmental consequences of the decision and then decide. This Court said the same thing in the *S.C.R.A.P.* II case. Only where an agency would have to disobey a *specific* statutory command in order to apply NEPA would the latter statute give way. In practically every conceivable set of circumstances, including the one here, such a situation does not occur. *Joint Senate Oversight Hearings,* 92nd Cong. 2nd Session, Ser. No. 92-H-32 (1972) pp. 455-6.

The argument of Petitioner that enforcement of NEPA frustrates the statutory scheme of ILSA completely ignores the obvious legislative intent that Federal agencies *must* reconcile conflicts and fashion compromises. The legislative intent, which has been unanimously accepted by all of the Federal Courts, is not to choose *either* to carry out a development mandate *or* to protect the environment. This instance is merely a lame attempt by HUD to escape the duties of NEPA and its own regulations.

The fallacy of the either/or argument was destroyed

with finality in *Calvert Cliffs Coordinating Committee v. A.E.C.*, supra.

A recent lucid example is *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689.

> "Superimposed upon this grant to the SEC of broad rulemaking authority is the Congressional mandate to the federal agencies which is contained in NEPA; that is, NEPA gives specific content to the SEC's authority under the securities laws to require disclosure of information 'in the public interest'. As analyzed in *Calvert Cliffs' Coordinating Comm. v. AEC,* 449 F.2d 1109 [2 ERC 1779] (D.C. Cir. 1971), the procedural requirements of NEPA § 102, 42 U.S.C. § 4332, must be carried out 'to the fullest extent possible'. These procedural requirements are, inter alia: (1) that "policies, regulations, and public laws of the United States shall be interpreted and administered' in accordance with NEPA policies; and (2) that 'all agencies of the Federal Government shall—. . . . (F) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.' Thus, Congress has directed the SEC and this Court to interpret the securities laws *to the fullest extent possible* in accordance with the overriding Congressional mandate of NEPA to protect and enhance the Nation's environment. Specifically, *Congress* has determined that the dissemination of information to governmental units, institutions, and interested individuals, can aid the purposes of NEPA." (Emp. added)

Petitioners admit that ILSA is patterned after the Securities and Exchange Act of 1933, 15 U.S.C. § 77a et seq.

Under § 1706(a) of ILSA the Statement of Record becomes effective 30 days after filing but the Secretary is required to give due regard to protection of purchasers *and* the public interest in determining the actual effective date.

Under § 77h of the Securities and Exchange Act, the effective date is 20 days after filing. Notwithstanding the so-called "automatic" effective dates, the Court in *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689, stated in effect that the S.E.C. had to comply with NEPA.

That S.E.C. has accepted this ruling is disclosed by the fact that the S.E.C. has failed to appeal therefrom and is now or has conducted public hearings to bring its procedures into compliance with NEPA.

In spite of HUD's statement that disclosure filings under ILSA are not Federal actions for the purposes of NEPA Flint Ridge *admits* that NEPA applies to interstate land sales on p. 17 of its Petition to this Court as does the government on page 17, note 16 of its brief.

HUD's refrain throughout this protracted evasion of its duties under NEPA is that it made no recommendation or report on proposals for legislation, but it does

NOT DENY THAT it *took action* (permitting an interstate land sales filing to become effective) and cannot now challenge a finding of fact that this led to a substantial adverse effect on the quality of the human environment. Nor can HUD ignore that Section 102(2)(C) of NEPA includes such action, and in fact HUD admits that its own regulations, 24 C.F.R. 1710.105 and 1710.110, require some disclosure of environmental information. The incredible and destructive irony of HUD's attitude is reflected by its letter of March 7, 1974 to Respondents, in which the administrator of the OILSR said:

> "In July, 1973, Secretary Lynn promulgated policy contained in 1390.1, A Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality. Disclosure filings required by the Interstate Land Sales Full Disclosure Act are not considered federal actions for purposes of compliance with the National Environmental Policy Act and implementing regulations."

The cold, undisguised truth is that HUD's own handbook gives the lie to its claims. *HUD has already made a determination that NEPA applies to interstate land sales filings.* (Handbook 1390.1, 38 FR 19182, July 18, 1973, 39 FR 38922 Nov. 4, 1974).[15]

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[15] This Handbook was promulgated in response to NEPA's directive that the Federal Government use all practicable means to implement national environmental policy. One of the main tools for compliance is the EIS. The Handbook sets forth HUD policy

Further rule making is really not required. HUD has rules and procedures to establish the environmental effects of its decision to declare that Flint Ridge or any other developer has complied with the Interstate Land Sales Act. Petitioner has attacked the decision below on the ground that it converts "any Federal action" into major Federal action. To begin this is similar to a syllogism with one premise missing because the argument fails to take into consideration the *unappealed* from Findings of Fact that there is major federal action AND SUBSTANTIAL EFFECT ON THE QUALITY OF THE HUMAN ENVIRONMENT. See *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.*, supra, at 45 L.Ed.2d 215.

Second, Petitioner, Flint Ridge, details a number of statutes involving authority to an agency to control or

Note 15—*Continued*

and delineates the procedure which all HUD agencies will follow in arriving at the determination as to if and when an EIS is to be prepared. Chapter 2, Part 5(a)(1), of the Handbook lists all HUD activities which are exempt from the requirements of the Handbook. There are three complete exemptions ("an individual action on a one-to-four family dwelling, training grants, individual rehabilitation grants"), and two partial exemptions which concern emergency disaster relief programs. Following the enumerated exemptions is the statement, "*Except for these exemptions, all HUD actions must undergo one or more environmental clearances.*" OILSR activities, therefore, would be included in the category which is subject to the HUD procedure of environmental clearance. That procedure consists of a three-tier review of all actions including individual project actions, legislation, regulations, and all policy documents.

regulate some form of private activity. These statutory provisions are no different than the control of interstate land sales given to HUD by ILSA. See, for example 15 U.S.C. § 1705(12), § 1706(a)(d), § 1707(a), and 24 C.F.R. § 1710.105. In fact, it is even a crime to sell without HUD approval under the Interstate Land Sales Act.

The relevant regulation, 24 C.F.R. 1700.80(a)(b)(c) is set forth in the Appendix D. These statutes and regulations establish beyond challenge that ILSA gives HUD federal control over, direct involvement in, and power to approve action of private parties which can and does adversely affect the environment. The Circuit Court opinion did in fact deal with organic statutes no different from the organic statute involved here.

Even assuming, although we do not agree, that there is a two-test standard under NEPA, no decided case (including *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.* at p. 215 of 45 L.Ed.2d) has refused to require an EIS when the effects of the so-called minor activity were significant. See e.g., *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314 and *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408.

To even assert operational conflict at this late date is to admit violation of the law. Section 103 of NEPA mandated review of existing agency programs and au-

thorities. HUD is subject to the same criticism with regard to this section of the Act as was the A.E.C.

> "The Commission, however, cannot justify its time lag under these Section 103 provisions. Indeed, it has not attempted to do so; only intervenors have raised the argument. Section 103 could support a substantial delay only by an agency which in fact discovered an insuperable barrier to compliance with the Act and required time to formulate and propose the needed reformative measures. The actual review of existing statutory authority and regulations cannot be a particularly lengthy process for experienced counsel of a federal agency. Of course, the Atomic Energy Commission discovered no obstacle to NEPA implementation. Although it did not report its conclusion to the President until October 2, 1970, that nine-month delay (January to October) cannot justify so along a period of noncompliance with the Act. It certainly cannot justify a further delay of compliance until March 4, 1971. *Calvert Cliffs Coordinating Committee v. A.E.C.,* supra, p. 1120.

V
CONCLUSION

There is no question that NEPA applies to federal permission to private parties. In this case, the permission takes the form of a letter of compliance which is issued as a result of a *decision* that all things necessary to be done have been.

The issue is: *Based on the facts of this case* whether

OILSR must prepare an environmental impact statement before granting permission to sell in interstate commerce for this particular development. THERE IS NO DOUBT THAT IN THE ABSENCE OF THAT PERMISSION THIS PROJECT, WHICH HAS DEMONSTRABLE POTENTIAL AND ACTUAL ENVIRONMENTAL EFFECTS, would never have begun and would never be completed. In issuing a letter of compliance the Government has taken steps which have a significant impact on the environment. It is required to prepare an environmental impact statement.

There are no excuses for noncompliance in this case and it would violate the law to have them. Congress meant what it said in NEPA. And it is time for HUD to stop violating the law and get on with the business of the interdisciplinary approach to protecting the environment.

We ask you to affirm.

Respectfully submitted,

ANDREW T. DALTON, JR.
JAMES N. KHOURIE
2536 East 51st Street
Tulsa, Oklahoma 74105

APPENDIX A

Department of Housing and Urban Development Procedures for Protection and Enhancement of Environmental Quality

Dept. Handbook 1390.1, 38 FR 19182 (July 18, 1973), amend. 39 FR 38922 (Nov. 4, 1974)

On October 20, 1972 (37 FR 22673) the Council on Environmental Quality published HUD Circular 1390.1, "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality" implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91-190). Although this Circular was issued as a draft on July 16, 1971, it was made effective immediately, pending issuance of final procedures.

The Department consulted with the Council on Environmental Quality on the procedures and considered comments from interested parties, including numerous Federal agencies. Major changes and improvements have been made, and the revised procedures are now being issued in the form of HUD Handbook 1390.1, "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality." These new procedures will facilitate and promote the Department's implementation of the National Environmental Policy Act of 1969.

On May 2, 1973 (38 FR 10856) the Council on Environmental Quality published proposed revised guidelines on the preparation of environmental impact statements. These proposed guidelines provide that, after they are made effective, each Federal agency shall revise its procedures to respond to requirements imposed by the revised guidelines.

Since the Department's new procedures will substantially improve implementation of its environmental responsibilities and will soon be further revised to comply with the revised CEQ Guidelines, comment and public procedure would be unnecessary and contrary to the public interest and good cause exists for making HUD Handbook 1390.1 effective upon publication.

Interested parties are invited to submit written comments concerning the revised procedures to the Rules Docket Clerk, Office of the General Counsel, Room 10256, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

(Sec. 7(d), Department of HUD Act; 42 U.S.C. 3535(d); sec. 102(2), National Environmental Policy Act of 1969; 42 U.S.C. 4332(2))

JAMES T. LYNN
Secretary of Housing
and Urban Development.

[1390.1]

DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

HUD STAFF

Approved June 11, 1973.

TABLE OF CONTENTS

CHAPTER I—General Policy and Responsibility

1. Purpose and authority.
2. Terminology.
3. General policy.
4. Office responsibilities for protection and enhancement of environmental quality.

a. Assistant Secretary for Community Planning and Development.
b. General Counsel.
c. Assistant Secretaries and Federal Insurance Administrator.
d. Assistant Secretary for Administration.
e. Regional Administrators.
f. Area Office and Insuring Office Directors.

CHAPTER II—Environmental Clearances

5. Environmental Clearance Policy on HUD Actions.
   a. General.
      (1) Exemptions.
      (2) Additional requirements.
      (3) Controversy.
      (4) Retroactivity.
      (5) Evaluation of comprehensive activities.
      (6) Properties listed on, or nominated to, the National Register of Historic Places.
      (7) Environmental Clearance Forms.
      (8) Relationship between A-95 procedures and environmental clearance procedures.
      (9) Updating environmental clearances.
   b. Normal environmental clearance.
   c. Special environmental clearance.
      (1) Project level actions.
      (2) Policy actions (legislation, regulations, policy and guidance documents).
   d. Environmental impact statement clearance.
6. Public disclosure.

CHAPTER III—Review of Other Agencies Environmental Impact Statements

7. HUD comments on environmental impact statements. Initiated by Other Federal Agencies.

CHAPTER IV—[Reserved]

APPENDICES

A. Proposed HUD actions requiring special environmental clearance or environmental impact statement clearance.
  A-1. Project level actions subject to threshhold criteria.
  A-2. Other HUD actions with special requirements.
B. Environmental decision making process.
  B-1. Initial determination of required environmental clearance.
  B-2. Flowchart of environmental clearance procedures.
C. Environmental clearance forms.
  C-1. Applicant's environmental information (Form ECO-1) and instructions.
  C-2. Normal environmental clearance worksheet (Form ECO-2).
  C-3. Special environmental clearance worksheet (Form ECO-3).
  C-4. Environmental finding resulting from special clearance.
D. Environmental Impact Statement.
  D-1. Outline of content of environmental impact statement for HUD project level actions.
  D-2. Outline of content of environmental impact statement for HUD policy actions.
  D-3. Format for summary sheet of environmental impact statement.
  D-4 Format for cover page of HUD environmental impact statement.
E. Field Responsibilities for environmental clearance.
F. Format for finding of inapplicability for policy actions.

G. Outline of content for HUD comment on environmental impact statements of other agencies.
H. HUD Areas of jurisdiction by law or special expertise.
I. Title I of the National Environmental Policy Act of 1969 (P.L. 91-190). [1]
J. Executive Order 11514, protection and enhancement of environmental quality. [2]
K. Council on environmental quality guidelines on statements on proposed Federal actions affecting the environment. [3]
L. Advisory Council on Historic Preservation, National Register of Historic Places, Protection of Properties; Procedures for Compliance. [4]
M. Executive Order 11593, protection and enhancement of the cultural environment. [5]

DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

CHAPTER I—General Policy and Responsibilities

1 *Purpose and authority.* The National Environment Policy Act of 1969 (P.L. 91-190) establishes new national policy, goals and procedures for protecting and enhancing environmental quality. The act, effective January 1,

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[1] Filed as part of the original document. See 83 Stat. 852, 42 U.S.C. 4321 note.

[2] Filed as part of the original document. See 35 FR 4247, March 7, 1970.

[3] Filed as part of the original document. See 36 FR 7724, April 23, 1971.

[4] Filed as part of the original document. See 37 FR 24146, November 14, 1972.

[5] Filed as part of the original document. See 36 FR 8921, May 15, 1971.

1970, establishes the Council on Environmental Quality to set overall policies to implement the Act.

The National Environmental Policy Act (NEPA) directs the Federal government to use all practicable means, including financial and technical assistance, to implement the national policy. NEPA governs all Federal departments and agencies and requires systematic attention to the environmental consequences of all Federal activities.

The purposes of this Handbook are to set forth departmental environmental policy, to assign responsibilities, and to provide procedural guidance to all headquarters and field offices for environmental clearances under NEPA. The Handbook applies to HUD legislative proposals, policy and guidance documents (including guides, regulations, handbooks, circulars, technical standards, etc.), and individual project approval actions on insurance, loans and grants, subsidies and demonstration projects.

This Handbook is based on authority provided in:

a. The Department of Housing and Urban Development (HUD) Act of 1965 (P.L. 89-174) which provides that the Secretary may make rules and regulations as may be necessary to carry out his functions, powers, and duties, and sets forth, as a matter of national purpose, the sound development of the Nation's communities and metropolitan areas;

b. The National Environmental Policy Act of 1969 (P.L. 91-190) which establishes a comprehensive policy for protection and enhancement of environmental quality by the Federal Government, creates the Council on Environmental Quality (CEQ) in the Executive Office of the President and directs Federal Agencies to carry out the purposes of this Act;

* * *

2. *Terminology*—a. *Environment.* Environment is not defined in NEPA or in the CEQ Guidelines. However, it is clear from section 102 of the Act and elsewhere that the term is meant to be interpreted broadly to include physical, social, cultural, and aesthetic dimensions. Examples of environmental considerations are: air and water quality, erosion control, natural hazards, land use planning, site selection and design, subdivision development, conservation of flora and fauna, urban congestion, overcrowding, displacement and relocation resulting from public or private action or natural disaster, noise pollution, urban blight, code violations and building abandonment, urban sprawl, urban growth policy, preservation of cultural resources, including properties on the National Register of Historic Places, urban design and the quality of the built environment, the impact of the environment on people and their activities.

b. *Major Federal actions significantly affecting the quality of the human environment.* Those actions taken by a Federal agency which require Environmental Impact Statements in accordance with section 102(2)(C) of the National Environmental Policy Act. As HUD processes between 15,000 and 20,000 applications per year at the project level, not including insurance actions on individual houses, the three level environmental clearance process defined in this Handbook shall be used to determine which action is a major Federal action significantly affecting the quality of the human environment.

c. *Significant environmental impact.* For the purposes of this Handbook, the term "significant environmental impact" is used to describe the consequences of an ac-

tion significantly affecting the quality of the human environment. This term is defined to some extent in paragraph 5 of the CEQ Guidelines, but the definition in general is a matter of discretion delegated to agency heads for formulation of guidelines subject to the approval of CEQ.

d. *Environmental impact.* An environmental impact is any alteration of environmental conditions or creation of a new set of environmental conditions, adverse or beneficial, caused or induced by the action or set of actions under consideration. Assessment of the significance of the environmental impact generally involves two major elements: A quantitative measure of magnitude and a qualitative measure of importance. Such a determination is a matter of agency judgment and consensus; at the project level, this judgment shall be governed by HUD environmental policies and standards.

e. *HUD environmental policies and standards:* National, Departmental, and program objectives, policies, standards, and procedures. These include: (1) National environmental goals and policies as expressed in the National Environmental Policy Act, other statutes and Executive Orders listed in paragraph 1 above, and guidelines issued by the Council on Environmental Quality; (2) Department-wide standards and policies such as HUD Circular 1390.2; and (3) environmental considerations contained in program policy and guidance documents, including environment-related project selection criteria, minimum property standards, and environmental elements of program circulars, handbooks and other issuances. Further clarification will be provided with the revision of program policies, procedures, standards and criteria and/or issuance of the consolidated office-wide circulars or handbooks of environmental policies and standards as

provided in paragraph 4.c. (2).

f. *Major amendatory.* For the purposes of this Handbook, a significant change in the nature, magnitude or extent of the action from that which was originally evaluated and which may have a significant affect on the quality of the human environment, such as an environmentally significant change in location or site, area covered, size or design in which case they require environmental clearance. An increase or decrease in cost is considered a major amendatory only when the increase or decrease reflects such an environmentally significant change in the project.

g. *Threshold.* A criterion of size or of environmental impact above which a Special Environmental Clearance is always required. The threshold is designed to screen out the more important HUD actions for special attention. HUD thresholds are set forth in Appendix A-1 of this Handbook.

h. *Decision points.* Those points of Federal commitment in the decision-making process before which prescribed environmental clearances must be completed. HUD decision points are set forth in Appendix A-1 of this Handbook.

i. *Finding of inapplicability (negative statement).* A determination by an authorized HUD official, under the authority of the HUD Guidelines approved by CEQ, which are issued in accordance with the CEQ Guidelines implementing NEPA, that no Environmental Impact Statement is required for the proposed HUD action under consideration. The Finding of Inapplicability for project level actions is a part of the Special Environmental Clearance. The format for the Finding of Inapplicability for policy actions is set forth in Appendix F.

* * *

3. *General policy.* The national goal of "a decent home and a suitable living environment for every American family"—established by the Housing Act of 1949 and subsequently reaffirmed by Congress in 1968—is central to the mission of the Department of Housing and Urban Development (HUD). *The National Environmental Policy Act (NEPA) furthers this goal. While recognizing that adverse environmental impacts are sometimes unavoidable in pursuing other goals, NEPA requires that environmental values be given appropriate consideration in decision-making along with economic and technical factors.* The object is to achieve the optimum balance among competing needs and goals—not to stop the building of cities, but rather to build with foresight so that rational development is achieved with due regard for the capacity of natural and man-made systems and for the quality of life attained within the resulting environment.

In addition to the prevailing national emphasis on anti-pollution and conservation aspects, HUD is also concerned with the environment of urban areas and how it affects the quality of life. Efforts to improve the quality of the environment certainly involve the abatement and prevention of many annoying and threatening nuisances—air pollution, water pollution, land pollution, noise—which impinge on our daily living. But efforts to improve environmental quality also include more positive actions such as provision of open space, the development of aesthetically pleasing urban areas, provision of adequate access to employment and cultural opportunities, reductions in structural deficiencies, maintenance of high quality in new construction, and appropriate planning for the proper juxtaposition of spaces for various human activities.

a. It is the policy of the Department to reject pro-

posals which have unacceptable environmental impacts, based on HUD environmental policies and standards, which cannot be avoided, and to encourage modification of project proposals or plans in order to enhance environmental quality and minimize environmental harm. At each stage of the environmental clearance HUD officials shall work with the applicant to seek means for avoiding adverse environmental impact, maximizing environmental quality, and considering superior alternatives.

b. When environmental clearances reveal conditions or safeguards which should be implemented once a project is approved in order to protect and enhance environmental quality or minimize adverse environmental impacts, such conditions or safeguards shall be set forth as requirements in the contract, grant, or other documents which delineate the obligations of the recipient. The contractor's performance in meeting such conditions shall be monitored and evaluated as part of the normal project monitoring and evaluation.

c. Environmental impact shall be evaluated on as comprehensive a scale as is feasible, with a view to the overall cumulative impact of HUD actions and programs, as well as the project specific impacts of a particular proposal. Environmental factors shall be considered as early as possible in the review and decision-making process.

d. Section 102(2)(A) of the National Environmental Policy Act directs all agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment." When making determinations regarding environmental impacts, HUD officials shall consult HUD professional

personnel, such as urban planners, landscape architects, civil engineers, sanitary engineers, architects, economists, demographers, sociologists, lawyers, and others who are qualified to provide advice on specialized and broad aspects of environmental concerns.

e. HUD officials shall continue to establish and review environmental policies, standards and procedures for administering HUD programs to promote environmental quality. HUD policies and procedures must be consistent with this Handbook.

* * *

CHAPTER 2—Environmental Clearances

5. *Environmental clearance policy on HUD actions.* The purpose of this section is to establish a procedure for determining whether a proposed HUD action is a "major Federal action significantly affecting the quality of the human environment", and whether the proposal should be accepted, rejected, or modified accordingly.

a. *General.* The procedure involves a three level environmental clearance process: Normal Environmental Clearance; Special Environmental Clearance; and Environmental Impact Statement Clearance.

Normal Clearance is essentially a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Special Clearance requires an environmental evaluation of greater detail and depth. Finally, an Environmental Impact Statement is the complete and fully comprehensive environmental evaluation, including formal review by other Federal, State and local agencies, as prescribed by section 102(2)(C) of NEPA.

Many HUD actions will be subject to a Normal Environmental Clearance. On the basis of that clearance, the proposed project shall be accepted, rejected, or modified accordingly. However, if, even after appropriate modification to mitigate environmental impacts, it is determined that there is potential significant environmental impact, Special Clearance procedures shall be initiated. If, after Special Clearance and the implementation of any changes mitigating environmental impacts, such impacts are still significant as a result of the action, an Environmental Impact Statement shall be prepared on the proposed action.

Not all proposed actions will undergo Normal Environmental Clearance. Some, because of their size or for other reasons, shall be processed directly through Special Clearance or Environmental Impact Statement Clearance. Projects which shall go directly through Special Clearance or Environmental Impact Statement Clearance are described in Appendices A and B-1.

All required environmental clearances shall be completed prior to the decision points described in Appendix A. The environmental clearance process is discussed further in Appendix B.

(1) *Exemptions.* Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this paragraph shall not apply to those HUD actions which have been determined not be "major Federal actions significantly affecting the quality of the human environment". These shall include an individual action on a one-to-four family dwelling, training grants, or rehabilitation and modernization projects which do not extend the life of a structure twenty (20) years or more. Exemptions from environmental clearances do not exempt these activities from the requirements of Section 106 of the National Historic Preservation Act of 1966 when a property is listed on, or nominated to, the Na-

tional Register of Historic Places. (See Appendix L for Advisory Council on Historic Preservation procedures.)

Planning assistance projects (701 Comprehensive Planning Assistance grants and other planning loans and grants) are exempted from the procedural requirements, but in lieu thereof an environmental assessment of the final planning product shall be required as part of the proposed planning program.

With respect to disaster relief and emergency activities of the Department, procedures for environmental clearance shall not apply to actions designed to meet the temporary housing needs of the affected population. Disaster activities which provide permanent housing and other recovery efforts will follow the environmental clearance procedures. However, where required by the serious nature of the situation and upon the approval of the Assistant Secretary for CPD, activities such as disaster related early land acquisition, clearance of damaged structures and relocation efforts may take place prior to the completion of the environmental review.

Except for these exemptions, all HUD actions must undergo one or more environmental clearances. (Emp. added)

(2) *Additional requirements.* The responsibilities and clearance requirements set forth in this paragraph represent minimum Departmental requirements. Regional Administrators and Area and Insuring Office Directors with the concurrence of the Regional Administrator have discretion to require such additional clearances and responsibilities as are deemed necessary for the effective implementation of this Handbook.

(3) *Controversy.* Decisions resulting from Normal or Special clearance shall give adequate consideration to existing or potential environmental controversy. Issues raised by opponents and supporters of the HUD actions

shall be carefully examined to determine whether the project involves significant environmental impacts. Major controversy which appears to raise substantive environmental issues is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated. For example, in the case of projects which would ordinarily require only Normal Clearance, major environmental controversy should weigh heavily in the decision to undertake a Special Clearance. Likewise for projects which normally require only Special Clearance, major controversy on environmental issues should weigh heavily in the decision to undertake Environmental Impact Statement Clearance.

(4) *Retroactivity.* To the maximum extent practicable, environmental clearance shall be required for uncompleted projects which have never gone through an environmental clearance under NEPA, at such time as a subsequent significant HUD action, such as the next stage of program approval or approval of a major amendatory, is proposed. Where it is not practicable to reassess the basic course of action, major attention should be given to measures, which, given the stage of project completion, may reduce adverse environmental impact. It is also important in taking further action that account be taken of environmental consequences not fully evaluated at the outset of the project.

(5) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. For example, several subdivisions may form a large new development. Likewise, a comprehensive project may be composed of, or include, several interrelated

activities, e.g., development of a new community or redevelopment of a center city area. In these cases, and where feasible, HUD offices should aggregate individual activities into a larger package and environmental evaluation shall concentrate on the broad and cumulative impacts of the larger activity, as well as the project specific impact of component activities to the extent known.

The comprehensive environmental evaluation will not satisfy the requirements of this Handbook, howeveer, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited scope will be necessary on subsequent, individual actions in order to fulfill the requirements of this Handbook.

Impacts of individual activities may be singularly limited but cumulatively considerable. One purpose of this provision, therefore, is to stimulate a more comprehensive environmental evaluation. In addition, there may be environmental impacts which are common to all or most components of the larger activity. A secondary purpose, therefore, is to eliminate duplicative evaluative efforts where possible. In no case shall this provision be interpreted to avoid a detailed examination of environmental impacts.

* * *

APPENDIX B

HUD Proposed Rules, 24 C.F.R. Part 50

Subpart B—Environmental Clearances on HUD Actions

§ 50.10 Purpose.

The purpose of this subpart is to establish a procedure for determining whether a proposed HUD action is a "major Federal action significantly affecting the quality of the human environment", and whether the proposal should be accepted, rejected, or modified accordingly.

§ 50.11 Environmental clearance process.

The procedure involves a three level environmental clearance process: Normal Environmental Clearance; Special Environmental Clearance; and Environmental Impact Statement Clearance. Normal Clearance is essentially a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Special Clearance requires an environmental evaluation of greater detail and depth. Finally, an Environmental Impact Statement is the complete and fully comprehensive environmental evaluation, including formal review by other Federal, State and local agencies, as prescribed by section 102(2)(C) of NEPA. Many HUD actions will be subject to a Normal Environmental Clearance. On the basis of that clearance, the proposed project shall be accepted, rejected, or modified accordingly. However, if, even after appropriate modification to mitigate environmental impacts, it is determined that there is potential significant environmental impact, Special Clearance procedures shall be initiated. If, after Special Clearance and the implementation of any changes mitigating environmental impacts, such impacts are still significant as a result of the action, an Environmental Impact Statement shall be prepared on the proposed action. The mere

mitigation of adverse effects does not indicate that a project has no significant impact; an Environmental Impact Statement may be required even though adverse effects have been mitigated. All required environmental clearances shall be completed prior to the decision points described in Appendix A.

(a) *Exemptions.* Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this subpart shall not apply to those HUD actions which have been determined not to be "major Federal actions significantly affecting the quality of the human environment". These shall include an individual action on a one-to-four family dwelling, training grants, or rehabilitation and modernization projects which do not extend the life of a structure twenty (20) years or more. Exemptions from environmental clearances do not exempt these activities from the requirements of section 106 of the National Historic Preservation Act of 1966 when a property is listed on, or nominated to the National Register of Historic Places.

(1) Planning assistance projects (701 Comprehensive Planning Assistance grants and other planning loans and grants) are exempted from the procedural requirements, but in lieu thereof an environmental assessment of the Final planning product shall be required as part of the proposed planning program.

(2) With respect to disaster relief and emergency activities of the Department, procedures for environmental clearance shall not apply to actions designed to meet the temporary housing needs of the affected population. Disaster activities which provide permanent housing and other recovery efforts will follow the environmental clearance procedures. However, where required by the serious nature of the situation and upon the approval of the

Assistant Secretary for CPD, activities such as disaster related early land acquisition, clearance of damaged structures, and relocation efforts may take place prior to the completion of the environmental review.

(3) *Except for these exemptions, all HUD actions must undergo one or more environmental clearances prior to the decision-points listed in Appendix A-1 to this part.* (Emp. added)

(b) *Limitation on actions pending clearance.* Pending preparation and completion of any environmental clearance, the appropriate HUD official may, after consultation with the Assistant Secretary for CPD or his designee, direct an applicant to refrain from taking any action with respect to a project which such official determines might have an adverse environmental effect or might so alter the environmental premises on which the clearance is based as to affect the validity of the conclusions reached. Such official may also direct the applicant to take such additional actions as he determines are necessary to preserve the status quo. The applicant shall promptly comply with all directions issued in accordance with this subsection.

(c) *Additional requirements.* The responsibilities and clearance requirements set forth in this subpart represent minimum Departmental requirements. Regional Administrators and Area and Insuring Office Directors with the concurrence of the Regional Administrator have discretion to require such additional clearances and responsibilities as are deemed necessary for the effective implementation of this part.

(d) *Controversy.* Decisions resulting from Normal or Special Clearance shall give adequate consideration to existing or potential environmental controversy. Issues raised by opponents and supporters of the HUD actions shall be carefully examined to determine whether the project involves significant environmental impacts. Major

controversy which appears to raise substantive environmental issues is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated. For example, in the case of projects which would ordinarily require only Normal Clearance, major environmental controversy should weigh heavily in the decision to undertake a Special Clearance. Likewise for projects which normally require only Special Clearance, major controversy on environmental issues should weigh heavily in the decision to undertake Environmental Impact Statement Clearance.

(e) *Retroactivity.* To the maximum extent practicable, environmental clearance shall be required for uncompleted projects which have never gone through an environmental clearance under NEPA, at such time as a subsequent significant HUD action, such as the next stage of program approval or approval of a major amendatory, is proposed. Where it is not practicable to reassess the basic course of action, major attention should be given to measures which, given the stage of project completion, may reduce adverse environmental impact. It is also important in taking further action that account be taken of environmental consequences not fully evaluated at the outset of the project.

(f) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. The comprehensive environmental evaluation will not satisfy the requirements of this part, however, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited

scope will be necessary on subsequent individual actions in order to fulfill the requirements of this part.

* * *

(h) *Environmental clearance forms.* Environmental clearance forms shall be used in conducting the required environmental clearance(s) for project level actions as directed in this part. Form ECO-1, completed by the applicant, shall be used by HUD principally as a source of factual information. An independent environmental assessment and evaluation shall be conducted by HUD on Form ECO-2 or Form ECO-3, or an Environmental Impact Statement shall be prepared. The completed clearances shall become part of the application file and shall accompany the proposal through the review and decision-making process.

(1) The Applicant's Environmental Information, Form ECO-1, shall be required of applicants for all project proposals except those exempted in § 50.11(a)(1). The applicant shall be provided with Form ECO-1 along with the required program application forms, and the environmental clearance requirements shall be explained in the earliest stages of contact and application preparation. The appropriate HUD official shall indicate to the applicant the initial level of environmental clearance required for the proposed project. The completed Form ECO-1 shall accompany A-95 notification where required. It shall be submitted to HUD with the completed application.

(2) After obtaining information from other sources, HUD shall evaluate and verify the information provided by the applicant on Form ECO-1. HUD may begin preparing the appropriate clearance worksheet at this time or may await the resolution of problems. The applicant shall be asked to modify or supplement Form ECO-1 as appropriate: If there is inadequate information,

the applicant shall be asked to supplement Form ECO-1 with documentation as necessary; if there are environmental problems, the applicant shall be asked to present solutions, modify the project, include measures to enhance environmental quality or reduce adverse environmental impacts, provide assurances and documentation as necessary, and amend or revise Form ECO-1 accordingly. HUD shall then complete the appropriate environmental clearance worksheet, or shall prepare the Draft Environmental Impact Statement.

(i) *Relationship Between A-95 procedures and environmental clearance procedures.* OMB Circular A-95 provides a mechanism for securing comments and views of State and local agencies regarding the impact, including environmental impact, of Federal and Federally-assisted projects. The A-95 requirements are coordinated, but not synonymous, with the requirements set forth in this part. Those programs or projects which are not subject to A-95 requirements are nevertheless subject to environmental clearance requirements unless specifically exempted in § 50.11(a)(1). The requirements of this part and OMB Circular A-95 shall be coordinated in the following manner:

(1) *Project Notification and Review System (PNRS).* The A-95 Project Notification and Review System requires that, for non-housing programs covered by Attachment D of the A-95 Circular, the applicant submit to the appropriate clearinghouses a notice of intent to file an application for Federal assistance. For housing projects exceeding A-95 thresholds listed in paragraph 7c of Attachment A and under programs listed Attachment D, HUD is required to send the application submitted by the applicant to the appropriate clearinghouses. Housing projects under A-95 thresholds are not subject to the A-95 requirements. Environmental clearances procedures

set forth in this part require that the applicant prepare Form ECO-1. For programs also covered by the A-95 Circular, such form shall accompany the A-95 submission.

(2) *Inclusion of A-95 Comments in Draft EIS.* A-95 review of a proposed project generally takes place prior to the preparation of an impact statement. Therefore, comments on the proposed project that are secured during this stage of the A-95 process must be included in the Draft EIS. The comments received from clearinghouses, or by State and local environmental agencies through clearinghouses, in the A-95 review shall be attached to the draft impact statement when it is circulated for review.

(3) *Review of environmental impact statement.* If an Environmental Impact Statement is required, HUD shall notify the appropriate A-95 clearinghouses of HUD's intent to prepare and file the Draft Statement. When the Draft Statement is distributed, HUD shall send copies of the Statement to the appropriate clearinghouses for review and comment, regardless of whether or not the subject proposal is covered by OMB Circular A-95. The clearinghouses shall also receive copies of the Final Statement for their information.

(j) *Updating environmental clearances.* Environmental clearances shall be updated by revision, amendment or addendum to the original clearance, if:

(1) Additional information with significant implications for environmental impact or additional environmental impacts not previously considered is discovered during the review process. Actions which went through Normal or Special Environmental Clearance shall be updated by revision, amendment or addendum to the original environmental clearance worksheet. A new finding shall then be made on the basis of all information,

and action taken accordingly. For actions for which a Draft and Final Environmental Impact Statement was prepared and distributed, the Final Statement shall be revised and reissued, or an addendum to the Statement shall be prepared and distributed. Such revision or addendum shall be subject to the same review and comment procedures as was the original Final Statement.

(2) Major amendatories are proposed. For major amendatories, the type and extent of environmental clearance required shall depend on the type, size and scale of the proposed action as amended. If an EIS is prepared for the amendatory, it shall be prepared and processed pursuant to § 50.14.

(3) HUD approval action is required for component activities whose environmental impacts were not addressed in sufficient detail in original environmental clearance for the larger action. Such clearance shall focus on the environmental impact of the specific project and site and need not treat the environmental impact on the more comprehensive level addressed in the original Environmental Impact Statement. A finding shall then be made as to the significance of the environmental impact of the specific project activity, and action taken accordingly. If an Environmental Impact Statement is prepared for the component activity, it shall be prepared and processed pursuant to § 50.14.

§ 50.12 Normal environmental clearance.

Normal Environmental Clearance shall be required for HUD actions for which it is not immediately evident that Special Environmental Clearance or Environmental Impact Statement Clearance is required. Normal Environmental Clearance is a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Information shall be requested

from the applicant on Form ECO-1 and gathered from other sources as appropriate. After modifications to the proposal to mitigate environmental impacts as necessary, HUD shall conduct an independent assessment and evaluation on Form ECO-2.

(a) *Responsibility for clearance.* Responsibility for Normal Environmental Clearance shall rest with the Area/Insuring Office program staff. An information copy shall be sent to the ECO.

(b) *Action resulting from clearance.*

(1) If after appropriate modifications to the proposal there exist environmental impacts which are unavoidable, and, based on HUD environmental policies and standards, such impacts are also considered unacceptable, then the proposal shall be rejected.

(2) If there is no significant environmental impact, processing of the proposal may proceed. Conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document.

(3) If after appropriate modifications to the proposal to mitigate environmental impacts, there remains significant or potentially significant environmental impact, Special Environmental Clearance or EIS, as appropriate, is required. The mere mitigation of adverse effects does not indicate that a project has no significant impact; an EIS may be required even though adverse effects have been mitigated.

§ 50.13 Special environmental clearance.

Project level actions found to require Special Environmental Clearance by virtue of their size or scale (in relation to the thresholds in Appendix A-1 to this part) or other characteristics indicating significant en-

vironmental impact, or as a result of Normal Environmental Clearance, shall be subject to the requirements in paragraph (a) of this section. Proposed legislation, regulations, policy issuances, guidance documents, and revisions to such regulations and documents, which may have significant environmental impact, shall be required to undergo the Special Environmental Clearance for policy actions as set forth in paragraph (b) of this section.

(a) Project level actions. Special Environmental Clearance for project level actions is a preliminary version of the analysis required in the Environmental Impact Statement. It provides the HUD official with a factual basis for determining whether the proposed action has a significant environmental impact and hence, whether it should be approved, rejected, or modified, or whether an Environmental Impact Statement is required. Information required shall be requested from the applicant on Form ECO-1 and gathered from other sources as appropriate. After modifications to the proposal to mitigate environmental impacts as necessary, HUD shall conduct an independent assessment and evaluation. On the basis of this assessment an environmental finding shall be made and accompany the application through the review process.

* * *

(2) *Action resulting from clearance.*

(i) If after appropriate modifications to the proposal, there exist environmental impacts which are unavoidable, and, based on HUD environmental policies and standards, such impacts are also considered unacceptable, then the proposal shall be rejected.

* * *

(iii) If after appropriate modifications to the proposal to mitigate environmental impacts, there remains

significant or potentially significant environmental impact, an Environmental Impact Statement shall be prepared. The mere mitigation of adverse effects does not indicate that a project has no significant impact; an EIS may be required even though adverse effects have been mitigated.

* * *

§ 50.14 Environmental impact statement clearance.

Environmental Impact Statement Clearance shall be required for all major HUD actions significantly affecting the quality of the human environment.

(a) *Environmental impact statement.* The Environmental Impact Statement is comprised of two stages, Draft and Final.

(1) *Notice of intent to file an environmental impact statement.* As soon as practicable after a determination is made that a HUD action will require the preparation and circulation of an environmental impact statement, a Notice of Intent to File shall be prepared to inform the public and to solicit comments that may be helpful in preparing the statement. Copies of this notice shall be sent to local newspapers, groups known to be interested in the agency's activities, the chief executive of the general unit of local government, local and State agencies, A-95 clearinghouses, the Assistant Secretary for CPD, the RO and CO-ECOs, and the RO Public Information Officer. When the appropriate HUD official determines that an environmental impact statement is not necessary, a Notice of Intent Not To File an EIS shall be prepared to inform the public under the following circumstances:

(i) HUD has previously announced the action would be the subject of an environmental impact statement; or

(ii) HUD has made a Finding of Inapplicability in response to a request from CEQ for the preparation and

circulation of an EIS.

The notice shall include a statement of the reasons for this decision. This determination and the reasons for the decision shall be prepared and disseminated in the same manner as a Notice of Intent to File an EIS.

* * *

(d) *Action resulting from clearance.* Based on the Environmental Impact Statement clearance, including comments and suggestions by other agencies and interested parties, HUD shall attempt to mitigate adverse environmental impacts to the extent practicable. If there remain adverse environmental impacts which are unavoidable, and based on HUD environmental policies and standards, such impacts are also considered unacceptable, the proposal shall be rejected. Otherwise, unavoidable adverse environmental impacts shall be weighed against benefits to be obtained from approval of the proposal. Where environmental costs which would be incurred outweigh such benefits, the proposal shall be rejected. Where benefits of the proposal outweigh environmental costs, processing may proceed; conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document.

APPENDIX C

Title 24—Housing and Urban Development

Subpart B—Delegations of Basic Authority and Functions

§ 1700.80 Director of the Examination Division, Office of Interstate Land Sales Registration, and Deputy.

To the position of Director of the Examination Division, Office of Interstate Land Sales Registration, and under his supervision to the position of Deputy Director there are delegated and assigned the following authorities and responsibilities.

(a) To receive and examine all statements of record and property reports filed under the provisions of the Interstate Land Sales Full Disclosure Act and all amendments and corrections to such statements.

(b) To determine the adequacy of disclosure of statements of record and property reports and amendments thereto and to effect corrections, additions, and deletions in such statements and reports deemed necessary to achieve the purposes of the Interstate Land Sales Full Disclosure Act.

(c) To find effective or to recommend to the Administrator that he declare not effective statements of record filed under the Interstate Land Sales Full Disclosure Act and to prepare and present evidence in connection with hearings and other administrative proceedings relative to statements of record declared not effective.

* * *

§ 1710.45 Suspensions.

(a) *Suspension notice—prior to effective date.*—(1) A suspension notice with respect to a Statement of Record or an amendment may be issued to a developer by the

Secretary within 30 days after the date of filing if prior to its effective date, the Secretary has reasonable grounds to believe that a Statement of Record is on its face incomplete or inaccurate in any material respect; or prior to its effective date, the Secretary has reasonable grounds to believe that an amendment is on its face incomplete or inaccurate in any material respect.

(2) Suspension notices issued pursuant to this subsection shall suspend the effective date of the statement or the amendment until 30 days, or such earlier date as the Secretary may determine, after the developer files such additional information as the Secretary shall require

(3) A developer, upon receipt of a suspension notice may request a hearing within 15 days of receipt of such notice. Such hearing shall be held within 20 days of receipt of such request by the Secretary.

(4) Suspension notices issued pursuant to this section shall continue in effect until all deficiencies cited in the notice are corrected.

(b) *Suspension orders—subsequent to effective date.*—(1) A notice of proceedings to suspend an effective Statement of Record may be issued to a developer if the Secretary has reasonable grounds to believe that an effective Statement of Record includes an untrue statement of a material fact, or omits a material fact required by the Act or the rules and regulations, or omits a material fact which is necessary to make the statements therein not misleading. The Secretary may, after notice, and after opportunity for a hearing requested within 15 days of receipt of such notice, issue an order suspending the Statement of Record. In the event that a suspension order is issued, such order shall remain in effect until the developer has amended the Statement of Record or otherwise complied with the requirements of the order.

When the developer has complied with the requirements of the order, the Secretary shall so declare and thereupon the suspension order shall cease to be effective.

(2) If the Secretary undertakes an examination of a developer or his records to determine whether a suspension order should be issued, and the developer fails to cooperate with the Secretary or obstructs, or refuses to permit the Secretary to make such examination, the Secretary may issue an order suspending the Statement of Record. Such order shall remain in effect until the developer has complied with the requirements of the order. When the developer has complied with the requirements of the order, the Secretary shall so declare and thereupon the suspension order shall cease to be effective.

(3) Upon receipt of an amendment to an effective Statement of Record, the Secretary may issue an order suspending the Statement of Record until the amendment becomes effective if he has reasonable grounds to believe that such action is necessary or appropriate in the public interest or for the protection of purchasers.

(4) Suspension orders issued pursuant to this subsection shall operate to suspend the Statement of Record as of the date the order is either served on the developer or his registered agent or is delivered by certified or registered mail . . .

* * *

As to the "not misleading" requirement, see Instruction A(2) of the Instructions for Completion of the Statement of Record, 24 C.F.R. Sec. 1710.105, which requires that

> "in addition to the information expressly required to be stated in the statement of record, there shall be added such further material information, documentation and certification, *if any, as may be neces-*

sary in the public interest and for the protection of purchasers or necessary in order to make the statements in the light of the circumstances under which they are made, not misleading.

APPENDIX D

5th Annual Report of C.E.Q. (pp. 21-26, 489-90)

* * *

Leisure Homes and Recreational Development

As incomes and leisure time have increased over recent years, there has been a growing demand for recreational facilities in rural areas. Out of this demand have come the phenomena of leisure home and recreational lot developments—high density developments in rural settings. These phenomena create the same types of costs as the forms of urbanization described above. With recreational developments, in fact, the long-term costs of development to both property owners and the public may be greater than in most urban areas, and there may be more urgent need for effective controls.

Leisure home developments, of course, are not a new phenomenon. The Florida east coast, Cape Cod, Estes Park, and Lake Tahoe have been the sites of second home construction for many decades. Originally, these homes were owned almost exclusively by wealthier Americans, and houses were often expensive and built on large sites.

The more recent boom in second homes and recreational lots has involved a far broader stratum of society. Increased affluence has given more Americans the opportunity and desire to obtain such properties for themselves. This, combined with a widespread belief in the profitability of investment in land and reinforced by favorable income tax laws, has provided the ingredients for the recreational land and leisure home boom. The lots are smaller, the houses are more spare than traditional summer homes, and demand is many times greater than it was even a few years ago. Today approximately

3.4 million American families own second homes. Including owners of recreational lots, a total of 5 to 7 million American families are estimated to own recreational properties of some kind.

Table 4 presents a number of characteristics of households owning leisure homes. It shows clearly that these homes are no longer the province of the very wealthy. They are owned by families somewhat wealthier and somewhat older than the average but still comprising essentially a cross section of society. (Corresponding information about owners of recreational lots is not available, although there is evidence that they tend to be less affluent.)

The material on leisure homes and other recreational properties was obtained from a study on leisure homes undertaken by the American Society of Planning Officials for the Council on Environmental Quality in association *with the Department of Housing and Urban Development* and the Appalachian Regional Commission. The study indicates the importance of distinguishing between two separate aspects of the phenomenon: (1) the purchase of recreational lots, which are usually part of large subdivisions of plotted land where few of the lots may ever be developed; and (2) the ownership of leisure homes, which may be built by the owner in a subdivision or on a separate site, or built in large numbers by a developer.

Recreation lot sales often result from mail solicitation or telephone calls, and many buyers sign sales contracts without ever seeing the land. The Interstate Land Sales Act requires most lot sales in interstate commerce to be registered with the Office of Interstate Land Sales at the Department of Housing and Urban Development. Table 5, showing the regional breakdown of projects so registered, and Table 6, showing leisure homes by region,

Table 4

Selected Characteristics of U.S. Leisure Home Owners and Total U.S. Population

Characteristic	Percent of all households	Percent of leisure home owners	Leisure home owners as a percent of total households
Annual family income			
Less than $5,000	29.4	18.8	2.9
$5,000 to $9,999	30.9	24.5	3.6
$10,000 to $14,999	22.6	23.7	4.7
$15,000 to $24,999	13.2	20.9	7.2
$25,000 or more	3.9	12.1	14.1
Value of primary home			
Less than $15,000	41.3	31.3	3.4
$15,000 to $19,999	20.2	17.8	4.0
$20,000 to $24,999	14.7	13.5	4.1
$25,000 to $34,999	14.1	18.1	5.8
$35,000 to $49,999	6.5	10.7	7.4
$50,000 or more	3.2	8.6	12.2
Tenure of primary home			
Owned	59.3	73.1	5.6
Rented	35.4	22.7	2.9
Co-op or condominium	0.5	1.1	11.0
Other	4.8	3.1	2.9
Primary residence			
Inside SMSAs	69.1	68.0	4.4
Central city	34.1	31.0	4.1
Urban balance	24.7	26.2	4.8
Remainder	10.4	10.8	4.7
Outside SMSAs	30.9	32.0	4.7
Urban	75.1	75.2	4.5
Rural	24.9	24.8	4.5
Rural–nonfarm	20.0	20.3	4.6
Rural–farm	4.9	4.5	4.1
Places 10,000 to 50,000	20.4	21.9	4.8
Age of head of household			
Less than 25 years	7.1	4.0	2.5
25 to 34 years	21.0	10.0	2.1
35 to 44 years	21.2	18.5	3.9
45 to 54 years	20.1	25.9	5.8
55 to 64 years	17.5	22.7	5.9
65 years or older	13.1	18.9	6.5
Family size			
1 person	17.6	13.3	3.4
2 persons	29.6	35.0	5.3
3 persons	17.2	18.1	4.7
4 or 5 persons	25.2	24.8	4.4
6 or more persons	10.4	8.8	3.8

Source: Richard L. Ragatz Associates, *Recreational Properties: An Analysis of the Markets for Privately Owned Recreational Lots and Leisure Homes* (Springfield, Va.: National Technical Information Service, 1974).

Table 5

Recreational Properties Registered with the Office of Interstate Land Sales

	Acres in projects		Lots in projects	
	Total	Per 100 acres of region's area	Total	Per 100 families in region
United States	**7,146,229**	**0.5**	**3,375,821**	**5.3**
Northeast	**231,555**	**0.2**	**133,671**	**0.9**
New England	77,251	0.2	36,766	1.0
Middle Atlantic	154,304	0.2	96,905	0.8
North Central	**279,214**	**0.1**	**224,886**	**1.3**
East North Central	168,634	0.1	132,389	1.1
West North Central	110,580	0.04	92,497	1.8
South	**3,370,140**	**1.0**	**2,037,908**	**10.6**
South Atlantic	2,243,119	1.4	1,113,146	11.8
East South Central	127,291	0.1	123,022	3.2
West South Central	999,730	0.4	801,740	13.5
West	**3,265,320**	**0.8**	**979,356**	**8.8**
Mountain	2,489,408	0.9	750,270	29.8
Pacific	775,912	0.6	229,086	2.6

Source: Richard L. Ragatz Associates, *supra* Table 4, pp. 84, 87, 500.

Table 6

U.S. Leisure Homes by Region, 1970

Region	Total housing units	Leisure homes [1]	Percent of all housing units in region	Percent of all leisure homes in United States
United States	**68,418,094**	**2,143,434**	**3.1**	**100.0**
Northeast	**16,641,954**	**556,790**	**3.4**	**26.0**
New England	4,031,531	221,806	5.5	10.4
Middle Atlantic	12,610,423	334,984	2.7	15.6
North Central	**19,018,773**	**667,148**	**3.5**	**31.1**
East North Central	13,323,755	421,225	3.2	19.7
West North Central	5,695,018	245,923	4.3	11.5
South	**20,730,508**	**631,242**	**3.0**	**29.5**
South Atlantic	9,970,059	287,374	2.9	13.4
East South Central	4,184,006	127,039	3.0	5.9
West South Central	6,576,443	216,829	3.3	10.1
West	**12,026,859**	**288,254**	**2.4**	**13.5**
Mountain	2,762,783	115,901	4.2	5.4
Pacific	9,264,076	172,353	1.9	8.0

[1] "Leisure Homes" are enumerated by combining the Bureau of the Census categories "Rural Seasonal Vacant" and "Other Rural Vacant." This combination basically includes housing units which are intended for occupancy during only certain seasons of the year.

Source: Richard L. Ragatz Associates, *supra* Table 4, p. 91.

indicate a heavy concentration of lots in the South and in the West. Six states—Florida, Texas, California, New Mexico, Arizona, and Colorado—contain over 80 percent of the acreage in registered recreational lot sales projects.

These figures demonstrate that recreational land and leisure home developments have become very important in the United States. With them have come a host of problems. Some problems are consumer-related, such as fraudulent advertising and high pressure sales tactics used to take advantage of naive buyers. Attempts are being made to curb these unethical practices through implementation of the Interstate Land Sales Act at the Federal level and through similar laws in some states.

Other problems arise because such development brings what amounts to instant urbanization to rural communities—communities where local governments have little experience with the impacts of large-scale development and few land use controls or regulatory bodies to deal with them.

Many leisure homes are being built in subdivisions that differ little in appearance from typical middle income suburban developments. Yet they are often built to much lower standards. If the home remains a summer weekend retreat, this may not create serious problems. But experience shows that seasonal homes are often converted into year-round homes and leisure home developments into permanent communities. This process may take a few years or decades, depending on the proximity of the homes to urban employment areas. In the mountains of northern Virginia, some homes in recreational subdivisions are being occupied as first homes from the time they are built, with their occupants commuting two hours or more to jobs on the fringes of Washington and Baltimore. School buses can be seen serving these developments

soon after the first houses go up. In short, the leisure home subdivision of today is likely to become the permanent settlement or suburb of tomorrow and should be viewed as an early form of urbanization.

This being true, it is necessary for a community to consider very carefully what development standards are appropriate for these subdivisions, particularly in communities with little growth experience, where officials are not equipped to cope with rapid growth and change. Many rural communities initially welcome second home developments in the expectation that they will provide property tax revenue and income for the local economy. They usually do, but they also create costs. Local governments often end up bearing the cost of increased demands the developments place on such public services as fire and police protection, road maintenance, water supply, solid waste disposal, and sewers. As long as recreational subdivisions remain seasonally occupied, these costs are likely to be lower than the property tax revenues generated by the development. However, as soon as residences become permanent, costs to the host communities will rise rapidly as schools, medical facilities, and other public services are required.

The eventual public costs will be particularly high if the development was originally built to low standards. Septic fields may have to be replaced by a sewer system; poorly constructed roads may have to be rebuilt. Replacing such facilities is very expensive, often more expensive than building adequate facilities at the time of the initial development.

Now only will the costs of low quality development be higher to the government, but they will also be higher to the homeowners. Inadequate insulation, poor drainage, and insufficient heating capacity may be small

problems during summer weekends, but they become major concerns at other times of the year.

The developments may also create serious environmental problems, although many of these can be avoided by careful design and review. Inadequate septic systems can pollute streams or aquifers and thus cause public health problems. Serious erosion can clog streams with silt. Demand for water can overtax local supplies. These environmental problems can cause particular difficulty because the most desirable sites for recreational developments are often in fragile environments unsuitable for housing development, such as steep mountain slopes, coastal dunes, or marshes.

In addition to such environmental problems, the developments also present potential conflicts with public recreational goals. The crowding of seasonal homes along the coast or around the shore of a lake often denies access to those resources for public recreation. And developing land adjacent to national parks and forests guarantees the owners that they will always have ready access to natural areas, but it prohibits the later expansion of public land holdings for the benefit of the general public.

Many of these problems are very similar to those faced in urban areas. The CEQ's study of second homes, mentioned above, will attempt to help rural communities in dealing with proposed developments. One specific product of the study is an impact evaluation handbook for local officials to use in assessing the costs and benefits of proposed recreation developments.

* * *

Leisure Homes Study

The Council, in association with the Department of Housing and Urban Development and the Appalachian

Regional Commission has sponsored an 18-month study of leisure home and similar recreational land projects. The study was conducted by the American Society for Planning Officials with the Conservation Foundation, the Urban Land Institute, and Professor Richard Ragatz of the University of Oregon as subcontractors. Some of the results of this study are discussed in Chapter 1 of this Annual Report.

The first part of the study involved an extensive analysis of the market for recreational properties. Using several new sources of data, this analysis summarizes what is known about the number and location of lots developed, homes built, projects started, facilities provided, and about the developers and owners of these properties. This analysis also includes regional projections of recreational developments.

The second part of the study involves an analysis of the economic environmental, social, and political impacts of leisure homes and certain other types of recreational developments on the localities and regions in which they occur. This analysis is based on an extensive review of previous research on leisure home development as well as a number of case studies undertaken by the research team. As mentioned in Chapter 1, the study concludes that leisure homes are over time converted into permanent residences and therefore should be viewed as a special form of early urbanization which generates the same types of economic, environmental, and social impacts as other residential developments. Further, leisure home developments may create more serious environmental problems than most residential developments because they often take place where there are few effective land use controls and are often built to lower standards and in less suitable environments—for example, on

mountainsides or in wetlands—than normal surburban subdivisions.

In terms of their economic impact on the local government, the study finds that as long as they are used only for recreational purposes, leisure homes usually generate tax revenues in excess of the costs of the public services required. However, as the developments become converted to permanent homes, these costs may exceed the tax payments, particularly if conversion results in a need for public investment to upgrade or replace roads, water supplies, and sewers.

Private recreational developments may also create social problems resulting from the impact of outsiders on the local culture and the way such developments interfere with the public's use of valuable recreational environments.

Finally, the study analyzes and recommends local, state, and Federal legislative mechanisms for mitigating the various adverse impacts that the developments may generate.

The results of the study will be published by CEQ and HUD. One volume will summarize the findings of the study, and a second volume will be a handbook for use by local officials in reviewing and evaluating the probable impacts of proposed projects.

APPENDIX E

15 U.S.C. § 1705

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

§ 1706. Effective date of statements of record and amendments thereto—Thirtieth day after filing or such earlier date as determined by Secretary; consolidation of subsequent statement with earlier recording

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

Incomplete or inaccurate statements of record

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incom-

plete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

Amendment of statement of record

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

Suspension of statement of record containing untrue statement or omission to state material fact; notice and hearing; termination of order of suspension

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in

accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

* * *

§ 1707. Information required in property report; use for promotional purposes

(a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1705 of this title. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

* * *

CERTIFICATE OF SERVICE

I, Andrew T. Dalton, Jr., a member of the bar of the United States Supreme Court, certify that I mailed a copy of this brief to Mr. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, and to Mr. F. Paul Thieman, Jr., Crowe & Thieman, 5800 East Skelly Drive, Tulsa, Oklahoma 74135, and to Hon. Toney Anaya, Attorney General of New Mexico, Box 2246, Sante Fe, New Mexico 87503 this _____ day of February, 1976.

_____

Andrew T. Dalton, Jr.

Supreme Court, U. S.
FILED
APR 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-510

FLINT RIDGE DEVELOPMENT COMPANY, *Petitioner,*

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER FLINT RIDGE DEVELOPMENT COMPANY

HARRY A. RISSETTO
EDWIN KRONFELD
THOMAS C. WATSON
HERBERT F. STEVENS
1800 M Street, N.W.
Washington, D.C. 20036
F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135
Counsel for Petitioner

Of Counsel:
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

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INDEX

Page

Argument 1

I. The Legislative History of § 102(2)(C) of NEPA Does Not Support Scenic Rivers' Claim That an Environmental Impact Statement Is Required for "All Federal Actions Which Affect the Quality of the Human Environment" But Does Show That HUD's Limited Role Under ILSA Is Outside the Reach of That Section 2

II. Since Congress in ILSA Did Not Delegate HUD Any Authority Over Land Development Activities Nor Any Power To Block Access to Interstate Commerce If the Disclosure Document Is Complete and Accurate on Its Face, HUD's Action Is Not a Major Federal Action Requiring an Environmental Impact Statement Under § 102(2)(C) of NEPA 5

III. Disclosure for Investors and Disclosure for Agencies 10

IV. HUD's Compliance with Its Environmental Regulations 16

Conclusion 17

Appendices:

A. Letter from George K. Bernstein, HUD, Interstate Land Sales Administrator, to Thomas A. McMullen, May 2, 1974 ..... 1a

B. Memorandum from David O. Meeker, Jr., HUD, Assistant Secretary, Community Planning and Development, to George K. Bernstein, HUD, Interstate Land Sales Administrator, May 15, 1974 3a

TABLE OF CITATIONS

CASES:

Ely v. *Velde*, 451 F.2d 1130 (4th Cir. 1971) 9

Natural Resources Defense Council v. *SEC*, 389 F.Supp. 689 (D. D.C. 1974) 10, 11, 12, 13

United States v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) 9-10

Page

STATUTES:

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* 2, 6

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1706(a) 8

National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* 1

National Environmental Policy Act of 1969, 42 U.S.C. § 4332(1) 1, 14

National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) .....*passim*

National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(G) 15

National Environmental Policy Act of 1969, 42 U.S.C. § 4333 .....15, 16

Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3733(a) 9

Securities Act of 1933, 15 U.S.C. § 77a *et seq.* 11, 12, 13

MISCELLANEOUS:

114 Cong. Rec. 15272 (1968) 6

Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969) 3, 4-5

S. Rep., No. 91-296, 91st Cong., 1st Sess. (1969) 3, 4, 15

HUD Departmental Handbook, 38 Fed. Reg. 19182 *et seq.*, as amended 39 Fed. Reg. 38922 *et seq.* 16

Letter from Edward L. Strohbehn, Jr., Attorney for Natural Resources Defense Council, to Ray Garrett, Jr. Chairman of the Securities & Exchange Commission, June 4, 1975 11-12

Page

Letter from George K. Bernstein, HUD, Interstate Land Sales Administrator, to Thomas A. McMullen, May 2, 1974 8

Memorandum from David O. Meeker, Jr. HUD, Assistant Secretary, Community Planning and Development, to George K. Bernstein, HUD, Interstate Land Sales Administrator, May 15, 1974 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-510

FLINT RIDGE DEVELOPMENT COMPANY, *Petitioner*,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONER FLINT RIDGE DEVELOPMENT COMPANY

In response to the briefs of the respondents (Scenic Rivers) and amici it is important to state at the outset that one issue which is *not* involved in this case is the general applicability of the National Environmental Policy Act (NEPA) as a whole to the Office of Interstate Land Sales Registration of the Department of Housing and Urban Development (HUD). As a reading of NEPA makes clear, although parts of NEPA, such as § 102(1), do apply to all agency actions, it is equally true that other parts of NEPA, specifically § 102(2)(C), apply only to a more limited group of agency actions, i.e., "major Federal actions significantly affecting the quality of the human environment." The principal issue in this case is whether HUD's checking of a statement of record triggers

the specific requirement in § 102(2)(C) of NEPA that HUD prepare a written environmental impact statement.

I. The Legislative History of § 102(2)(C) of NEPA Does Not Support Scenic Rivers' Claim That an Environmental Impact Statement Is Required for "All Federal Actions Which Affect the Quality of the Human Environment" But Does Show That HUD's Limited Role Under ILSA Is Outside the Reach of That Section.

Scenic Rivers attempts to bring HUD's limited action under the Interstate Land Sales Full Disclosure Act (ILSA) within the ambit of the environmental impact statement requirement of § 102(2)(C) of NEPA by arguing that:

> "The language of the legislative history indicates that Congress intended that the 'action-forcing' provisions of NEPA should apply to *all* Federal actions which affect the quality of the human environment." [1]

This argument fails both on its face and on careful analysis of the legislative history. If Congress meant that an environmental impact statement is required for "all" Federal actions, Congress would have said "all" in § 102(2)(C) of the Act it passed. It didn't; it said "major" Federal actions. No play on the words of the legislative history as contained in Scenic Rivers' Brief at 19-36 can camouflage Scenic Rivers' request that the Court read the word "major" right out of the Act. Moreover, Scenic Rivers conveniently sidesteps the broader question of whether Congress intended that an agency prepare a written environmental impact statement when that agency has no statutory authority over

[1] Resp. Brief at 31 (Emphasis in original).

activities that may significantly affect the quality of the human environment.

Scenic Rivers' argument that "the terms 'major' and 'significantly affecting' seem to have been used more for emphasis rather than as limitations" finds no support in the legislative history of § 102(2)(C).[2] In fact, Congress intended from the beginning to limit the Federal actions to which § 102(2)(C) applies. The first version of § 102(2)(C) covered "proposals for legislation or other *significant* Federal actions affecting the quality of the human environment."[3] The Senate Interior and Insular Affairs Committee substituted without explanation the word "major" for the word "significant" preceding "Federal actions" and added the word "significantly" before the phrase "affecting the quality of the human environment."[4] Congress thus always used "major" or "significant" to describe which actions of Federal agencies would require preparation of an environmental impact statement. There is no indication that these words were merely used for emphasis.

Indeed, the legislative history of NEPA provides examples of the kind of actions Congress had in mind when it required Federal agencies to prepare written environmental impact statements. These examples also show its intention that the words "major" and "sig-

[2] Resp. Brief at 32. Scenic Rivers' distinction between words of "emphasis" and "limitation" raises the question, what does "major" emphasize?

[3] *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 1st Sess. at 207 (1969) (Emphasis supplied).

[4] S. Rep. No. 91-296, 91st Cong., 1st Sess. 30 (1969).

nificantly" are words of limitation. In the Senate Interior and Insular Affairs Committee Report on NEPA, the Committee described § 102(2)(C) as follows:

> "Each agency which proposes any *major* actions, *such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs,* shall make a determination as to *whether* the proposal would have a significant effect upon the quality of the human environment. *If* the proposal is considered to have such an effect, then the recommendation or report supporting the proposal must include statements by the responsible official of certain findings . . . ."[5]

In the Senate Hearings, Senator Jackson described his intention to require agencies to meet certain environmental requirements for a limited type of Federal agency actions:

> "It seems to me that the policy problem falls into two categories: First, a broad statement of environmental policy that would apply to all of the governmental departments, with the Bureau of the Budget in a position to stipulate that when proposals come over, that they must meet certain environmental policies and standards.
>
> "I think the other area relates to quasi-judicial proceedings *where independent agencies are in a position to grant permits and licenses* for activities that potentially have an enormous impact on the environment. Perhaps we could work out some

[5] S. Rep. No. 91-296, 91st Cong., 1st Sess. 20 (1969) (Emphasis supplied).

> kind of a general statutory provision that would be applicable to all quasi-judicial proceedings."[6]

HUD does not make any *project proposal* regarding the land developments that are the subject of the anti-fraud disclosure document filed under ILSA. HUD also does *not* grant *permits or licenses* for any of the developer's activities that may affect the environment. Furthermore, HUD has no statutory authority over the site selection, planning, funding or construction of the developments. HUD's checking of statements of record under ILSA is so qualitatively different from the limited types of actions Congress had in mind to be covered by a written environmental impact statement, that its action cannot be considered major Federal action significantly affecting the environment.

II. Since Congress in ILSA Did Not Delegate HUD Any Authority Over Land Development Activities Nor Any Power To Block Access to Interstate Commerce If the Disclosure Document Is Complete and Accurate on Its Face, HUD's Action Is Not a Major Federal Action Requiring An Environmental Impact Statement Under § 102(2)(C) of NEPA.

Scenic Rivers argues that HUD undertook a major Federal action because "[w]hen an agency exercises jurisdiction based upon the plenary power of Congress to act under Constitutional authority, such action is per se major federal action."[7] Since all Federal agency authority ultimately stems from the power to legislate conferred upon Congress by the Constitution, under Scenic Rivers' test *every* Federal agency action—no

[6] *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. at 121 (1969) (Emphasis supplied).

[7] Resp. Brief at 45.

matter how limited—would be *per se* major and require a written environmental impact statement. Looking at the quoted language another way, it fails to recognize that Congress does not, of course, always delegate all of its Constitutional power in a field to a Federal agency. In this case the language of ILSA and its legislative history make it clear that ILSA was enacted as a full disclosure law, not a regulation of land development law. As Senator Williams, the chief sponsor of ILSA, said during the Congressional debates on the bill:

> "It is *not* a regulatory statute which will permit the Federal Government to *pass upon* such questions as land value, its selling price, land use, or zoning. *The only purpose* of this legislation is to give the purchaser the necessary information upon which he can make his own investment decision."[8]

In enacting ILSA, Congress could have gone to the limit of its authority under the commerce clause. It chose not to do so.

In the same vein Scenic Rivers argues that there is major Federal action because first, ". . . H.U.D.'s action is a regulatory action which, if not taken, will mean that a particular filing or development will never be able to be sold in Interstate Commerce"[9] and second, if sales in interstate commerce are not permitted

[8] 114 Cong. Rec. 15272 (1968).

[9] Scenic Rivers ignores the fact that if HUD takes no action at all when a statement of record is filed under ILSA, the statement of record automatically becomes effective in 30 days, allowing sales in interstate commerce to occur.

no environmental impact will occur.[10] This ignores the crucial point that under ILSA HUD can only block access to interstate commerce for one reason: the statement of record is incomplete or inaccurate on its face. HUD cannot consider any other factor, such as the nature or extent of the environmental impact of the development. Thus, HUD is without authority to make any decision for which an environmental impact statement is necessary. Since an environmental impact statement is not necessary, it cannot be required under § 102(2)(C).

Scenic Rivers sets up the straw-man that HUD has no discretion and then devotes substantial argument to show why that is a "myth". By doing so, Scenic Rivers impliedly recognizes that the nature and extent of a Federal agency's discretion is meaningful under § 102(2)(C) in considering whether an environmental impact statement must be prepared. Scenic Rivers states that the Secretary of HUD has discretion to

(1) "require additional documentation and certification in the *statement of record* under 15 USC § 1705(12) for the protection of purchasers",

(2) "determine that a material fact has been omitted which is necessary to make the *statement* not misleading under the circumstances",

(3) "suspend after the effective date of the *statement of record*, if it omits a material fact *she thinks* is necessary to make the statement not misleading" and

(4) "require certain information in the *property report* . . . because she feels it necessary to pro-

[10] Resp. Brief at 43 and 7. Scenic Rivers would have the Court hold that any amount of statutory authority over access to interstate commerce—however small and regardless of its nature—constitutes major Federal action each time it is, or even could be, exercised.

> tect the purchaser and the public interest, and she may make rules and regulations to so order."[11]

An examination of this discretion, however, demonstrates the merit of a central point in petitioner Flint Ridge Development Company's (Flint Ridge) argument: HUD's discretion is limited to insuring anti-fraud disclosure in the documents filed with it. More importantly HUD has no discretion over the development activities that affect the environment.

HUD's discretion with respect to disclosure should not be examined in a vacuum. It should be considered in contrast to the purpose of § 102(2)(C). The environmental impact statement requirement is triggered and is only meaningful when a Federal agency has discretion to decide whether and to what extent an activity may affect the environment.[12] An environmental impact statement gives the Federal agency an informed basis for making the decision. Because HUD has no authority to decide whether or to what extent Flint Ridge may affect the environment, the preparation of an environmental impact statement would be a mean-

[11] Resp. Brief at 52-53 (Emphasis supplied).

[12] Scenic Rivers claims that "[t]he action in this case was the *decision* to allow the developer to proceed in interstate commerce by the issuance of a letter of compliance with ILSA." Resp. Brief at 31-32. HUD issues no "letter of compliance with ILSA." The letter apparently referred to by Scenic Rivers is reprinted in Appendix A of this reply brief. It says that Flint Ridge's filing "became" effective. That is of course consistent with § 1706(a) of ILSA which provides that filings automatically become effective in 30 days unless they are either suspended or their effective dates are accelerated by HUD. HUD's "decision"—such as it was—was that since the amended statement of record did not appear to be incomplete or inaccurate on its face, there was no reason to wait until the automatic 30-day effective date.

ingless exercise for HUD that is irrelevant to its statutory function and responsibility.[13]

The State of California recognizes that HUD's discretion under ILSA is limited to disclosure in the statement of record. It suggests, however, that "NEPA introduces an element of discretion into agency decision-making that was not previously there" to provide HUD discretionary authority over any private development activity.[14] NEPA, however, cannot expand HUD's statutory authority from the documents to land development activities. To do so would contradict the intent of Congress that the Federal Government not become involved in land use or the merits of developments through the back door by way of ILSA. The Court made it clear in *United States* v. *Students Challenging Regulatory Agency Proce-*

[13] Scenic Rivers also states that the arguments put forward by the Law Enforcement Assistance Administration (LEAA) in *Ely* v. *Velde*, 451 F.2d 1130 (4th Cir. 1971) that it lacked discretion to deny a *grant* were "rejected", thus implying that the argument on the limits of HUD's discretion should similarily be rejected here. Resp. Brief at 47. In *Ely* v. *Velde*, however, the organic statute, the Omnibus Crime Control and Safe Streets Act of 1968, provided that:

> "The [LEAA] shall make *grants* under this chapter to a State planning agency *if* such agency has on file with the [LEAA] an *approved comprehensive* State plan . . . which conforms with the purposes and requirements of this chapter." 42 U.S.C. § 3733(a) (Emphasis supplied).

Moreover, the Fourth Circuit found that under that organic statute the agency could impose conditions on the making of a federal *grant* to fund the construction of a non-federal penal facility. 451 F.2d at 1135 and 1137. In the instant case HUD has no discretion to impose conditions upon the effectiveness of a statement of record based upon the environmental impact of the development. Furthermore, HUD cannot fund developments under ILSA.

[14] Amicus Brief of State of California at 7 n.4.

dures[15] that NEPA does not expand jurisdiction conferred by existing statutory authority:

> "The statutory language, in fact, indicates that NEPA was not intended to repeal by implication any other statute. Thus, 42 U.S.C. § 4335 specifies that '[t]he policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies,' and 42 U.S.C. § 4334 instructs that the Act 'shall [not] in any way affect the specific statutory obligations of any Federal agency. . . .' "[16]

Since NEPA cannot expand HUD's statutory authority to encompass land development activities and since HUD makes no decision for which an environmental impact statement is necessary, HUD cannot be required to prepare an environmental impact statement under § 102(2)(C) of NEPA.

III. Disclosure for Investors and Disclosure for Agencies

Scenic Rivers relies on *NRDC* v. *SEC*[17] to support its position that HUD is required to prepare an environmental impact statement for filings under ILSA. Scenic Rivers gives a misleading impression of the holding in that case when it states

> "[n]otwithstanding the so-called 'automatic' effective dates, the Court in *N.R.D.C.* v. *S.E.C.* (D.C. D.C., 1974) 389 F.Supp. 689, stated in effect that the S.E.C. had to comply with NEPA."[18]

[15] 412 U.S. 669 (1973).

[16] *Id.* at 694.

[17] 389 F.Supp. 689 (D. D.C. 1974).

[18] Resp. Brief at 72.

Scenic Rivers uses this description of the case as authority for the notion that § 102(2)(C) of NEPA overrides the requirement of ISLA that (absent a finding that a statement of record is incomplete or inaccurate on its face) the statement shall become effective 30 days after it is filed with HUD. This is urged notwithstanding the one or more years required to prepare an environmental impact statement. *NRDC* v. *SEC*, however, had nothing whatsoever to do with the effective date of registration statements filed under the Securities Act of 1933 ('33 Act), 15 U.S.C. § 77a *et seq.* or with environmental impact statements at all. Thus, the statutory provision and considerations at issue in the instant case were not even present in *NRDC* v. *SEC*.

In *NRDC* v. *SEC* the NRDC petitioned the SEC for a rulemaking to require disclosure of environmental information by *private persons* filing with the SEC—not preparation by the *agency* of an environmental impact statement on each filing.[19] The District

[19] In the rulemaking proceeding by the SEC which followed the District Court's opinion, NRDC made its position clear in a letter to Ray Garrett, Jr., Chairman of the SEC, dated June 4, 1975 in n. 11, pp. 8-9.

> "A number of industry comments objected to the disclosure proposals set out in the Release on the grounds that they would require preparation of a National Environmental Policy Act (NEPA) Section 102(2)(C) environmental impact statement, or its equivalent, and that they would require registrants and the Commission to comply with that section's requirements. . . . These objections appear to be largely a play on words. In effect, the argument runs, that just because we request that the Commission 'to the fullest extent possible' (*see* NEPA Section 102) require disclosures about the impact of corporate operations on the environment, so would we necessarily involve the Commission in the problems that an

Court had no occasion to address the environmental impact statement requirement of § 102(2)(C) or the impact of requiring such statements on the 20 day effectiveness provision of the '33 Act as it applies to registration statements. The District Court held only that "[t]he SEC failed to comply with the *procedural requirements* of the APA [Administrative Procedure Act] in adopting rules which fulfill NEPA [§§ 102(1) and 102(2)(G)] . . . ."[20]

Scenic Rivers asserts that "[a]ll three of these Acts [the '33 Act, ILSA and NEPA] require full disclosure of information to vouchsafe rational choice, whether that choice is to be made by the individual, or society through its appointed, but sometimes balky servants, the Federal agencies."[21] In its assertion,

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agency like the Atomic Energy Commission has in deciding whether to issue a license for construction of a nuclear power plant based on NEPA considerations. One might just as well argue that Commission insistence upon disclosure by a utility company of financial data (such as its property assets and annual earnings), which would bear on its potential vulnerability to action by a state authority regarding the utility's rates (by, for example, revealing the existence of 'write-ups' in the utility's property account or a relatively high rate of return), involves the Commission in trying or resolving the state rate case.

"Insofar as these industry objections involve a legal concern that registrants, in making environmental disclosures similar to those set out in the Release if so required by Commission rules, would have to comply with Section 102(2)(C) of NEPA, *it should be clear from all of our submissions that it is not our position that registrants, in making such disclosures, would have to comply with Section 102(2)(C) of NEPA or that the requirements of that section would apply to industry activities.*" (Emphasis supplied).

[20] 389 F.Supp. at 702 (Emphasis supplied).

[21] Resp. Brief at 18.

Scenic Rivers attempts to merge the types of disclosure required by the three Acts, despite their differences: Section 102(2)(C) of NEPA was enacted to provide for informed choice by *agencies*, taking environmental considerations into account, in their decision-making (agency disclosure); ILSA and the '33 Act were designed to provide for informed choice by *investors* in their making of investments (investor disclosure). That difference is crucial in this case, since HUD has no choice to make on the environmental effects of the development.

Despite Scenic Rivers' misuse of the decision, *NRDC* v. *SEC* does provide a good example of one court's view of the possible *non*-section 102(2)(C) NEPA requirements of an agency in the context of a basic disclosure statute. The District Court stated:

> "[s]uperimposed upon this grant to the SEC of broad *rulemaking* authority is the Congressional mandate to the federal agencies which is contained in NEPA; that is, NEPA gives specific content to the SEC's authority under the securities laws to require disclosure in registration statements of information 'in the public interest'."[22]

In fact, the NRDC was ultimately seeking to broaden investor disclosure by '33 Act registrants (not agency disclosure by the SEC) to include the disclosure by them of substantive environmental information such as the environmental effects of plant operations and activities.[23] Scenic Rivers could have filed a similar request that HUD require, under ILSA and, for example,

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[22] 389 F.Supp. at 695 (Emphasis supplied and footnote omitted).

[23] 389 F.Supp. at 692.

NEPA § 102(1), the disclosure of substantive environmental information by developers registering under ILSA, such as the environmental effects of subdivision developments. This suggested approach, while directed toward the basic purpose of wide dissemination of information, would *not* require HUD to prepare a detailed environmental impact statement on each development as described in § 102(2)(C) of NEPA.

The *amicus curiae* brief of the State of California emphasizes the importance of investor disclosure. While it sees § 102(2)(C) as the basic route to provide this disclosure, it also recognizes alternatives when it states at 13:

> ". . . prospective purchasers of subdivision developments sold interstate have a right and responsibility to know whether their investment in such developments would contribute to unnecessary degradation of environmental quality. NEPA and ILSA's purposes can be effectively harmonized by requiring the Secretary to provide information on potential environmental impacts of subdivision developments in the form of an EIS *or otherwise*, to prospective purchasers so that concerned citizens may elect not to purchase developments that are unnecessarily destructive of environmental quality."[24]

Reliance on § 102(2)(C), however, is not only unnecessary to the result sought by California but is also not well-founded, since that section of NEPA is designed to produce a decision-making document for use by Federal agencies whenever, and only whenever, they take "major Federal actions significantly affecting the quality of the human environment."

[24] (Emphasis supplied).

Agency disclosure should not be confused with investor disclosure. Since HUD has no decision to make on the merits of a proposed development, the preparation of an environmental impact statement by HUD becomes a futile exercise in terms of its responsibilities under its organic statute.[25] The proper route, of course, toward HUD's requiring additional investor disclosure by developers filing under ILSA is a Petition for Rulemaking, a procedure which Scenic Rivers never even attempted.

Scenic Rivers also misconstrues the reach of § 103 of NEPA and its applicability to this case. This

[25] The points raised by the States of New Mexico and California that NEPA § 102(2)(G) imposes environmental impact disclosure requirements despite "HUD's lack of power under ILSA to act in regard to environmental consequencies," (Amicus Brief of State of New Mexico at 3) are a bootstrap attempt to use § 102(2)(G) of NEPA as a separate basis for the requirement in § 102(2)(C) to prepare an environmental impact statement. These arguments do not find support in the legislative history. First, the predecessor of § 102(2)(G) was present in the original version of S. 1075. Since this version did not include the environmental impact statement requirement of § 102(2)(C), there is no necessary dependence of § 102(2)(G) on the environmental impact statement requirement for its validity. Second, the Senate Report No. 91-296, 91st Cong., 1st Sess. 9 states that the predecessor of § 102(2)(G) authorizes "all agencies of the Federal Government, *in conjunction with their existing programs and authorities*, to conduct research, studies, and surveys relating to ecological systems and the quality of the environment. This section also authorizes the agencies to make this information available to the public, to assist State and local government, and to utilize ecological information in the planning and development of resource-oriented projects." (Emphasis supplied). It was never intended to serve as an independent basis for an environmental impact statement. Moreover, § 102(2)(G) does not say anything about a detailed environmental impact statement being prepared. It merely authorizes agencies to make "information" from "research, studies and surveys" available to the public.

section required agencies to review their existing statutory authority in order to determine whether there were any deficiencies or inconsistencies which prohibited full compliance with the provisions of NEPA. In the context of the instant case, § 103 would have applied only if HUD had determined that its checking of statements of record under ILSA was major Federal action significantly affecting the environment and that it was prohibited by ILSA from preparing a detailed environmental impact statement in the light of the mandatory 30-day effective date. In that purely hypothetical situation, HUD would have gone to the President with a proposal to reconcile the conflict between the statutes. However, given the legislative intent as to the purpose of disclosure documents under ILSA and HUD's lack of authority with respect to land developments, HUD did not consider the filings under ILSA to involve major Federal actions and § 103 of NEPA was thus inapplicable in the circumstances.

IV. HUD's Compliance with Its Environmental Regulations

Scenic Rivers accuses HUD of not following its own rules [26] because filings under ILSA are not specifically exempted from the environmental clearance procedures. Scenic Rivers conveniently ignores section 1 of the Handbook: "[t]he Handbook applies to HUD legislative proposals, policy and guidance documents . . . and individual project approval actions on insurance, loans and grants, subsidies and demonstration projects." [27] Filings under ILSA do not fall

[26] HUD Departmental Handbook, 38 Fed. Reg. 19182 *et seq.*, as amended 39 Fed. Reg. 38922.

[27] 38 Fed. Reg. 19182.

within any of these categories. Thus, by its own terms, the Handbook does not apply to disclosure filings under ILSA. Moreover, HUD has never considered filings under ILSA to be major Federal actions triggering the applicability of § 102(2)(C).[28]

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below, to the extent that it affirms the judgment of the District Court, should be reversed.

Respectfully submitted,

HARRY A. RISSETTO
EDWIN KRONFELD
THOMAS C. WATSON
HERBERT F. STEVENS
1800 M Street, N.W.
Washington, D.C. 20036
F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Counsel for Petitioner

Of Counsel:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

[28] *See* memorandum from David O. Meeker, Jr., HUD, Assistant Secretary, Community Planning and Development, reprinted in Appendix B to this reply brief.

APPENDIX

APPENDIX A

OFFICE OF INTERSTATE LAND SALES REGISTRATION
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20411

2 May 1974

In Reply Refer To:
Deal

Mr. Thomas A. McMullen
5555 East Skelly Drive
Tulsa, Oklahoma 74135

Dear Mr. McMullen:

Subject: OILSR No. 0-3665-42-60, Flint Ridge Development Company, Flint Ridge No. 1, Filed February 5, 1974, Amendment filed April 26, 1974

Pursuant to Section 1407(a) of the Interstate Land Sales Full Disclosure Act the Statement of Record of the captioned subdivision became effective May 2, 1974. This letter has no retroactive effect upon your operation or sales, if any, made prior to your registration with this Office.

If you have not already done so, you should furnish this Office, within 20 days, the final printed version of the contract and Property Report * so that such documents may become part of the filing. The effective date indicated above must appear on the face of the Property Report.

As provided in Section 1407(c) of the Act, if at any time subsequent to the above effective date a change shall occur affecting any material fact required to be contained in the

---

* The Property Report shall be in accordance with Section 1710.110 *Additional Requirements For Property Report*, subparagraphs "a" and "b." It shall begin with the words "Property Report" and shall be verbatim to that found effective with this Office. Also, it shall have no covers, pictures, emblems, logograms, or identifying insignia other than that set forth in the Regulations.

Statement of Record, the Statement shall be amended to show such change. Section 1710.23 of the regulations requires that such amendment be filed within 15 days of the date on which the developer knows or should have known that there has been a material change.

Under Section 1407(d) of the Act, if it appears to the Secretary that an effective Statement of Record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, such Statement of Record may be subject to suspension proceedings.

Any questions in regard to the subject matter of this letter should be addressed to this Office.

Sincerely,
George K. Bernstein
Interstate Land Sales Administrator

/s/ JOHN R. MCDOWELL
By John R. McDowell
Deputy Administrator

APPENDIX B

MEMORANDUM

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

Date: 15 May 1974
In Reply Refer To:

To : George K. Bernstein
Interstate Land Sales Administrator

From : David O. Meeker, Jr.
Community Planning and Development

Subject: Applicability of HUD Handbook 1390.1 to Interstate Land Sales Registration

There have been a number of questions as to the applicability of HUD Handbook 1390.1 on "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality" to the registration of individual land developments sold in interstate commerce.

Handbook 1390.1 does not explicitly exempt the registration actions from provisions of the Handbook based on the determination that they are not "major Federal actions significantly affecting the quality of the human environment." Neither is the OILSR program listed as proposed HUD actions which require Special Environmental Clearance or Environmental Impact Statements. In the table covering these levels of environmental clearances, it is stated that "for programs not listed, consult the Assistant Secretary for Community Planning and Development".

It is our intent that individual land sales registrations be included in the list of activities which are fully exempted from environmental reviews. I want to state that this position was always the intent of this office and its predecessors in administering HUD's responsibilities under NEPA.

Failure to reflect this position adequately in the Handbook was an administrative oversight.

It is my understanding that the Interstate Land Sales Full Disclosure Act does not give HUD discretionary authority to disapprove proposed land developments that fully disclose the required information because of the quality of the subdivision. Rather, it provides that developers must register developments for which land is to be sold in interstate commerce with HUD by filing a full disclosure of the relevant facts about the property, and provide this information to prospective purchasers. HUD can act to prevent a developer from selling land only if the developer does not register and file the required disclosure. Simple disclosure of the facts obviously has no effect on the quality of the environment in an individual subdivision.

In light of the responsibilities of this office on environmental matters and to correct an oversight in HUD environmental policies in reference to the registration programs, I would conclude that individual registration should be exempted from environmental clearances and the final codified regulations, now in preparation, will reflect this determination.

/s/ David O. Meeker, Jr
Assistant Secretary

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of March, A.D. 1976.

Supreme Court, U. S.
FILED
MAR 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
Nos. 75-510 and 75-545

FLINT RIDGE DEVELOPMENT CO., and CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*, *Petitioners,*

vs.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Motion to File Amicus Curiae Brief Out of Time and Brief of the California Attorney General as Amicus Curiae in Support of Respondents

EVELLE J. YOUNGER,
Attorney General of the State of California,

NICHOLAS C. YOST,
C. FOSTER KNIGHT,
Deputy Attorneys General,

110 West "A" Street, Suite 600,
San Diego, Calif. 92101,
(714) 236-7349,

Attorneys for Amicus Curiae State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Motion to File Amicus Curiae Brief Out of Time 1

Brief of the California Attorney General as Amicus Curiae in Support of Respondents 3

Interest of Amicus Curiae 3

Summary of Argument 5

Argument 7

I

NEPA Supplements the Interstate Land Sales Act; Read Together, These Laws Require HUD to Inform the Public and Other Government Agencies of Potential Environmental Degradation Caused by Rural Subdivision Development 7

Conclusion 13

TABLE OF AUTHORITIES CITED

Cases — Page

Eastlake Community Council v. Roanoke Associates, 513 P.2d 36 (Wash. S.C. 1973) 7, 8

Friends of Mammoth v. Mono County, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049 (Cal. S.C. 1972) 4

Juanita Bay Valley Com. Ass'n v. City of Kirkland, 510 P.2d 1140 (Wash. Ct. of App. 1973) 4, 7, 8

NRDC v. Securities & Exch. Com'n, 389 F. Supp. 689 (DC DC 1974) 13

People of the State of California v. County of Kern, 39 Cal.App.3d 830, 115 Cal.Rptr. 67 (Cal. Ct. of App. 1974) 4

Secretary of Env. Aff. v. Massachusetts Port Auth., 323 N.E.2d 329 (S.J. Ct. Mass. 1975) 4

Miscellaneous

57 Opinions of the California Attorney General (1974), p. 587 11

Rules

Supreme Court Rules, Rule 42 1

Statutes

National Environmental Policy Act:

California (Pub. Res. Code §21000 et seq.) 3

Connecticut (Pub. Act No. 73-562, approved June 22, 1973) 3

Delaware (7 §7001 et seq.) 4

Georgia (Ga. Code Ann. Ch. 95-A-1, §241(e)(1)) 4

Page

Hawaii (Haw. Rev. Stat. Ch. 334 (1974)) 3

Indiana (§35-5301 et seq.) 4

Maryland (Ch. 702, Md. Laws of 1973) 4

Massachusetts (C. 30, §61 et seq.) 4

Minnesota (Chap. 412, Laws of 1973) 4

Mississippi (§49-27-11(i), Coastal Wetlands Protection Law) 4

Montana (§69-6501 et seq.) 4

New York (Art. 8, Environmental Conservation Law (1975)) 4

Nevada (§704.820 et seq.; Nevada Air Quality Regulations, Art. 13) 4

North Carolina (Sess. Laws-1971, Chap. 1203) .. 4

North Dakota (§54-01-05, 4 N.D. Century Code) 4

Puerto Rico (T. 12 §1121 et seq.) 4

South Dakota (S.D. Comp. Laws 1967 Ch. 11-1A (Supp. 1974)) 4

Virginia (Chap. 384, approved March 15, 1973) 4

Washington (§43.21C010 et seq.) 4, 7

Wisconsin (Chap. 273, Laws of 1971) 4

Code of Federal Regulations, Title 40, Sec. 1500.1 10

National Environmental Policy Act, Sec. 101(c) ..9, 12

National Environmental Policy Act, Sec. 102(G) .. 12

National Environmental Policy Act, Sec. 105 10

United States Code, Title 15, Sec. 1701 9

United States Code, Title 15, Sec. 1705 .....9, 12

	Page
United States Code, Title 15, Sec. 1706	10
United States Code, Title 15, Sec. 1706(a)	9
United States Code, Title 15, Sec. 1708	9
United States Code, Title 15, Sec. 1714(b)	9, 11
United States Code, Title 15, Sec. 1716	9
United States Code, Title 15, Sec. 1718	11
United States Code, Title 42, Sec. 4321	8
United States Code, Title 42, Sec. 4331(c)	9
United States Code, Title 42, Sec. 4332(c)	11
United States Code, Title 42, Sec. 4332(G)	8, 12
United States Code, Title 42, Sec. 4333	8
United States Code, Title 42, Sec. 4335	10

Texts

Anderson, F., NEPA in the Courts (1973), pp. 49-55	6
Anderson, F., The National Environmental Policy Act in Federal Environmental Law (E. Dolgin and T. Guilbert, ed., West Publishing Co. (1974), pp. 239, 287-288, 322	6
Yost, Council on Environmental Quality, Environmental Quality—1974 (5th Annual Report, 1974), note 2, pp. 401-409, 421-426	4
Yost, NEPA's Progeny: State Environmental Policy Acts, 3 Env. Law Rptr. (1973), pp. 50090, 50095	4

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Petitioners,

vs.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION TO FILE AMICUS CURIAE BRIEF OUT OF TIME

The State of California, acting by and through the Attorney General of California, respectfully requests permission to file out of time an amicus curiae brief in support of respondents pursuant to Rule 42 of the Supreme Court Rules.

Although we do not wish to delay the Court's consideration of this most important case, the Court's decision in this case involving the National Environmental Policy Act (NEPA) will have a major influence

on subsequent interpretations of California's "little NEPA" (the California Environmental Quality Act) which is patterned on NEPA. The California Attorney General is the chief law enforcement officer in the State and has responsibility for enforcing the California Environmental Quality Act.

Respondents' brief was filed March 1, 1976. We were not able to file our proposed amicus curiae brief in support of respondents prior to this time.

Dated: March 16, 1976.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

NICHOLAS C. YOST,
C. FOSTER KNIGHT,
Deputy Attorneys General,

By C. FOSTER KNIGHT,
Deputy Attorney General,

Attorneys for State of California as Amicus Curiae in Support of Respondents.

IN THE

Supreme Court of the United States

October Term, 1975
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FLINT RIDGE DEVELOPMENT CO., and CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,

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Brief of the California Attorney General as Amicus Curiae in Support of Respondents

Interest of Amicus Curiae

The State of California is interested in the outcome of this case in that it is one of twenty-five jurisdictions which have adopted laws or regulations patterned on the National Environmental Policy Act (NEPA).[1] An

[1]Fourteen states and Puerto Rico have legislatively adopted little NEPAs of general application. California (Pub. Res. Code § 21000 *et seq.*); Connecticut (Pub. Act No. 73-562, approved June 22, 1973); Hawaii (Haw. Rev. Stat. Ch. 334 (1974));

(This footnote is continued on next page)

interpretation of the National Act is bound to affect construction of the State acts.[2]

A very large number of rural subdivision developments intended for sale or sold interstate are located in California. The interest of amicus curiae is to insure that the National Environment Policy Act (NEPA) is construed in harmony with the Interstate Land Sales

Indiana (§35-5301 *et seq.*); Maryland (Ch. 702, Md. Laws of 1973); Massachusetts (C. 30, §61 *et seq.*); Minnesota (Chap. 412, Laws of 1973); Montana (§69-6501 *et seq.*); New York (Art. 8, Environmental Conservation Law (1975)); North Carolina (Sess. Laws-1971, Chap. 1203); Puerto Rico (T. 12 §1121 *et seq.*); South Dakota (S.D. Comp. Laws 1967 Ch. 11-1A (Supp. 1974)); Virginia (Chap. 384, approved March 15, 1973); Washington (§43.21C010 *et seq.*); and Wisconsin (Chap. 273, Laws of 1971). Five states have legislatively authorized little NEPAs of limited application. Delaware (7 §7001 *et seq.*); Mississippi (§49-27-11(i), Coastal Wetlands Protection Law); Georgia (Ga. Code Ann. Ch. 95-A-1, §241(e)(1)); Nevada (§704.820 *et seq.* Also see Nevada Air Quality Regulations, Article 13); North Dakota (§54-01-05, 4 N.D. Century Code). Five states have administratively promulgated NEPA equivalents. Arizona (Game and Fish Commission policy of July 2, 1971; Policy Memo, Requirements for Environmental Impact Statements, of June 9, 1971); Michigan (Executive Directive 1971-10, issued by Governor); Nebraska (Nev. Dept. of Roads, Department of Roads Action Plan (1973)); New Jersey (N.J. Exec. Order No. 53 (Oct. 15, 1973) and Administrative Order No. 33 (August 1, 1973)); and Texas (Policy for the Environment Adopted January 1, 1973). See: Yost, note 2; Council on Environmental Quality, *Environmental Quality—1974* (5th Annual Report, 1974), 401-409, 421-426. These states look to Federal judicial interpretations of NEPA to construe their own acts, Yost, note 2, at 50095.

[2]*Friends of Mammoth v. Mono County*, 8 Cal.3d 247, 260-261, 104 Cal.Rptr. 761, 769-770, 502 P.2d 1049, 1057-1058 (Cal. S.C. 1972); *Juanita Bay Valley Com. Ass'n v. City of Kirkland*, 510 P.2d 1140, 1146-1147 (Wash. Ct. of App. 1973); *People of the State of California v. County of Kern*, 39 Cal.App.3d 830, 841, 115 Cal.Rptr. 67, 75 (Cal. Ct. of App. 1974); see *Secretary of Env. Aff. v. Massachusetts Port Auth.*, 323 N.E.2d 329, 339 (S.J. Ct. Mass. 1975); also see Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 Env. Law Rptr. 50090, 50095 (1973).

Act (ILSA) to insure that the general public as well as state and local land use regulatory agencies receive as much information as possible on potential environmental degradation generated by rural subdivision developments sold interstate. Amicus curiae believes that the public interest objectives of both NEPA and ILSA are best served by requiring the Secretary of HUD to prepare an Environmental Impact Statement on its filing, registration or certification of Statements of Record and Property Reports on major subdivision developments that—as in this case—could significantly affect the quality of the human environment.

Summary of Argument

NEPA and the Interstate Land Sales Act (ILSA) must be construed together to effect their disclosure purposes. NEPA by its terms is supplementary to ILSA. The fact that the Secretary of HUD has very limited discretion over the interstate sale of subdivision developments after the developer files the Statement of Record does not preclude the Secretary from preparing and making available an Environmental Impact Statement on a subdivision development that could significantly affect the environmental quality. Such an EIS would assist prospective purchasers in making informed decisions and enable concerned citizens to fulfill their responsibilities under NEPA to contribute to protecting and enhancing environmental quality by electing not to invest in developments that unnecessarily degrade environmental quality. An EIS would also be of use

to state and local land use regulatory agencies. ILSA's provisions do not prohibit the Secretary from preparing an EIS in this case, nor is compliance with the EIS requirement impossible. On the contrary, NEPA's mandate is that federal agencies, "to the fullest extent possible,"[3] implement its policies and purposes. Amicus curiae believes that there is ample room under both NEPA and ILSA for the Secretary to prepare and make available an EIS on the subdivision developments in this case.

[3]This phrase has an extensive legislative and judicial history. See F. Anderson, *The National Environmental Policy Act* in Federal Environmental Law, 239, 287-288, 322 (E. Dolgin and T. Guilbert, ed., West Publishing Co. (1974); also see F. Anderson, *NEPA in the Courts,* 49-55 (1973).

ARGUMENT

I

NEPA Supplements the Interstate Land Sales Act; Read Together, These Laws Require HUD to Inform the Public and Other Government Agencies of Potential Environmental Degradation Caused by Rural Subdivision Development

Amicus curiae concurs with the result urged in this case by Respondent Scenic Rivers Association. In addition, amicus curiae urges the Court to interpret the provisions of the National Environmental Policy Act (NEPA) to recognize environmental impact disclosure obligations of federal agencies unless existing law applicable to an agency's operations expressly prohibits or makes compliance with such environmental impact disclosure duties impossible. Amicus curiae urges the Court to make it clear that this fundamental precept in NEPA applies even if an agency's statutory powers do not grant it discretionary authority over private development activity, but are rather mainly geared—as in the case of HUD's Office of Interstate Land Sales—to informing the public and protecting the public interest through disclosure of relevant data.[4]

[4]Alternatively, we note that NEPA introduces an element of discretion into agency decision-making that was not previously there. The state of Washington (like California and numerous other states) has a state law patterned on NEPA. (Wash. §43.21C010 *et seq.*) Since Washington courts look to Federal courts' NEPA interpretations for aid in interpreting the state law (*Juanita Bay Valley Com. Ass'n v. City of Kirkland,* 510 P.2d 1140, 1146-1147 (Wash. Ct. of App. 1973); see *Eastlake Community Council v. Roanoke Associates,* 513 P.2d 36 (Wash. S.C. 1973)), the converse may also be pervasive. In interpreting the State Environmental Policy Act the Washington Court has said:

> "The essential point is that SEPA requires the City, acting through its city council, actually to consider the various

(This footnote is continued on next page)

The National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) provides:

"§4332. The Congress authorizes and directs that, *to the fullest extent possible:* (1) the policies, regulations, and public laws of the United States *shall be interpreted and administered in accordance with the policies set forth in this Act*, and
(2) *all agencies* of the Federal Government *shall*—
". . .
"(G) *make available to States, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment; . . .*" (Emphasis added.) 42 U.S.C. § 4332(G).
"§4333. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiences or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act. . . ." 42 U.S.C. § 4333.
"§4334. Nothing in Section 4332 or 4333 of this title shall in any way affect the specific

environmental factors. The change in the substantive law brought about by SEPA introduces an element of discretion into the making of decisions that were formerly ministerial, such that even if we assumed, arguendo, that the issuance of a grading permit was, prior to SEPA, a ministerial, non-discretionary act, SEPA makes it legislative and discretionary. We hold that the City failed to exercise its legislative discretion under SEPA, and consequently grading permit No. G-023 was issued in a manner contrary to law." *Juanita Bay Valley Com. Ass'n v. City of Kirtland, supra,* 510 P.2d 1140, 1149 (Wash. Ct. of App. 1973); see *Id.*, at 1147-1148; also see: *Eastlake Community Council v. Roanoke Associates, supra,* 513 P.2d 36 (Wash. S.C. 1973).

statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon recommendations or certification of any other Federal or State agency.
"§4335. The policies and goals set forth in this chapter are *supplementary* to those set forth in existing authorizations of Federal agencies." (Emphasis added.)

NEPA's policies also make it clear that each citizen "has a responsibility to contribute to the preservation and enhancement of the environment." NEPA, Sec. 101(c), 42 U.S.C. § 4331(c).

Petitioners have sought to limit the application of NEPA in this case by pointing out that HUD's Office of Interstate Land Sales have no discretionary authority over private subdivision development subject to ILSA. Petition for Writ of Certiorari, page 10. Petitioner argues that "HUD's powers under the Act [ILSA] are limited to assuring that when developers sell lots, they disclose relevant facts to potential purchasers", and that HUD's performance of this disclosure function does not constitute a "major federal action" requiring the preparation of an EIS. Petition for Writ of Certiorari, page 10.

The Interstate Land Sales Act (15 U.S.C. § 1701 *et seq.*), however, was enacted not solely to protect purchasers but includes the broader objective of protecting prospective buyers and the "public interest." 15 U.S.C. §§ 1705, 1706(a), 1708, 1714(b), 1716.

As previously pointed out, NEPA Sec. 105 (42 U.S.C. § 4335) provides that NEPA's goals and policies are "supplementary" to existing statutes governing an agency's operations. The Council on Environmental Quality's *Guidelines For Federal Agencies Under The National Environmental Policy Act* (40 C.F.R. § 1500.1 *et seq.*) expressly require that "each agency of the Federal Government *shall* comply with that section [Sec. 102] unless existing law applicable to the agency's operations *expressly prohibits or makes compliance impossible.*" A review of ILSA's provisions nowhere discloses an express prohibition against the Secretary's preparation of an EIS in conjunction with the filing or registration of Statements of Record and Property Reports for the purpose of providing environmental impact information to prospective purchasers and state and local regulatory agencies. Nor does ILSA make compliance with NEPA impossible. Petitioners have pointed out that ILSA requires the Secretary to make Statements of Record effective within 30 days after they are filed, and that no EIS could possibly be prepared, circulated, commented on, and reviewed within that period. Petition for Writ of Certiorari, page 13. An EIS requirement, petitioners argue, would render 15 U.S.C. § 1706's 30-day requirement a nullity. Petition for Writ of Certiorari, page 14.

However, there is nothing in ILSA that prevents the Secretary from requiring developers intending to qualify for interstate sales from giving the Secretary 3 or 4 months' notice in advance of filing their Statements of Record or Property Report.[5] As petitioners

[5]In California, under our "little NEPA" we have construed that act together with the State's Forest Practice Act so as to harmonize both statutes in such a way as to require preparation of the state equivalent of an EIS prior to the running of a short period granted for approval of a timber harvesting plan. 57 Ops Cal.Atty.Gen. 587 (1974).

have pointed out, developers often have undertaken extensive planning, financing and other work before they come to HUD to file their Statements of Record. ILSA itself gives the Secretary broad rulemaking authority to implement the disclosure purpose of that Act. 15 U.S.C. § 1718. The Secretary is also authorized to "publish information," and to ". . . investigate facts, conditions, practices or matters" related to interstate sale of subdivision developments not only to aid in enforcement of ILSA but also for the purpose of

> ". . . prescribing of rules and regulations . . ., or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates." 15 U.S.C. § 1714(b).

The above-quoted section, for example, would certainly appear to authorize, indeed encourage, the Secretary to prepare an EIS on its entire role in interstate sales of subdivision developments and the need for further legislation. NEPA's Section 102 dovetails with this provision in requiring federal agencies to prepare an EIS on "every recommendation or report on *proposals for legislation.*" 42 U.S.C. § 4332(c). (Emphasis added.)

The provisions in ILSA governing the content of Statements of Record are consistent with NEPA's objective of providing the general public (prospective purchasers) and state regulatory agencies with environmental impact information which the federal agency

has *or is able to obtain* from its operations. 15 U.S.C. § 1705; NEPA Sec. 102(C)(G); 42 U.S.C. § 4332(G). As the District Court for the District of Columbia has said, with respect to NEPA's application to the Security Exchange Commission's disclosure function:

> ". . . the principal purposes of the federal security laws is full disclosure of material information; this purpose reflects the Brandeis philosophy that 'sunlight is said to be the best of disinfectants' [citation omitted]. Plaintiffs would use the corporate disclosures they seek [*e.g.*, the nature and extent to which a company's product or activity causes pollution or injury to natural areas, and the feasibility for correcting environmental damage] not only in their role as public educators, but also as investors and voting shareholders making informed, socially responsible investment decisions. Secondly, Congress declared in NEPA (1) that one of the purposes of NEPA is 'to promote efforts which will prevent or eliminate damage to the environment' and (2) that 'each person has a responsibility to contribute to the preservation and enhancement of the environment' and (3) that 'all agencies of the Federal Government shall— . . . make available to states, . . . institutions, and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment'. Plaintiffs seek through public education, investment of funds, and voting of shareholdings, to do their part to encourage corporate responsibility in environmental matters. This Court can conceive of no other individuals or institutions who could have a greater interest

> which NEPA protects than Plaintiffs." *NRDC v. Securities & Exch. Com'n,* 389 F. Supp. 689, 698 (DC DC 1974).

Similarly in this case, prospective purchasers of subdivision developments sold interstate have a right and responsibility to know whether their investment in such developments would contribute to unnecessary degradation of environmental quality. NEPA and ILSA's purposes can be effectively harmonized by requiring the Secretary to provide information on potential environmental impacts of subdivision developments in the form of an EIS or otherwise, to prospective purchasers so that concerned citizens may elect not to purchase developments that are unnecessarily destructive of environmental quality. Since NEPA is supplementary to ILSA's provisions, and since NEPA's command is that federal agencies comply "to the fullest extent possible,"[8] amicus curiae believes that the Tenth Circuit's decision correctly harmonized the two statutes in requiring the Secretary to prepare an EIS in this case.

Conclusion

Both NEPA and ILSA are disclosure statutes for the benefit not only of federal agencies in making decisions to the extent their enabling legislation allows, but also to provide the general public and prospective purchasers with an opportunity to contribute to the preservation and enhancement of the environment. Although the Secretary's discretionary authority over the approval of subdivision developments

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[8] *Supra,* note 3.

intended for interstate sale is very limited, the Secretary has the ability and is not precluded by existing law from obtaining relevant environmental impact data on such subdivision developments, and making it available to prospective purchasers and state and local land use regulatory agencies, in the form of an EIS or otherwise. The decision below requiring the preparation of an EIS in this case should be upheld since it correctly harmonizes the purposes and intent of both NEPA and ILSA.

Dated: March 16, 1976.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

NICHOLAS C. YOST,
C. FOSTER KNIGHT,
Deputy Attorneys General,

Attorneys for Amicus Curiae State of California.

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